JOINT APPENDIX

Nos. 74-165 and

74-166

74-167

74-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

UNITED STATES RAILWAY ASSOCIATION, APPELLANT,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

RICHARD JOYCE SMITH, AS TRUSTEE OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, DEBTOR, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*, *Plaintiffs*, v. UNITED STATES RAILWAY ASSN., *et al.*, *Defendants*.	)	Civil Action No. 74-189
RICHARD JOYCE SMITH, Trustee of The New York, New Haven and Hartford Railroad Company, *Plaintiff*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants*.	)	Civil Action No. 74-1107
PENN CENTRAL COMPANY, *Plaintiff*, v. CLAUDE S. BRINEGAR, *et al.*, *Defendants*.	)	Civil Action No. 74-1149

STIPULATION AS TO RECORD AND JOINT APPENDIX

The parties to the above captioned cases stipulate as follows:

I

Contents of Joint Appendix

The Joint Appendix printed for the use of the Court and all parties will contain:

1. This stipulation
2. Opinions below (orders included):
   a. Opinions of 3-judge court, dated June 25, 1974
   b. Opinion of Judge Fullam in Penn Central 120-day proceeding, dated May 2, 1974
   c. Opinion of Judge Fullam in secondary debtors 120-day proceedings, dated May 2, 1974
   d. Opinion of Judge Fullam in Penn Central 180-day proceeding, dated July 2, 1974
   e. Opinion of Judge Fullam in secondary debtors 180-day proceeding, dated July 2, 1974
3. Papers in *Connecticut General, et al.* v. *USRA, et al.*, Docket No. 74-189:
   a. Docket entries
   b. Complaint, dated January 25, 1974
   c. Order adding parties plaintiff, dated February 4, 1974
   d. Answer of defendants, dated March 4, 1974
   e. Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the Property of Penn Central Transportation Company, Debtor, for leave to intervene, dated April 3, 1974

   f. Answer of Penn Central Trustees, dated April 3, 1974
   g. Order granting the Trustees leave to intervene, dated April 19, 1974
   h. Stipulation as to the record, dated April 15, 1974
   i. Affidavit of Louis A. Craco, dated April 16, 1974, together with stipulation of facts attached thereto and dated April 15, 1974 (including Exhibits A and B thereto), affidavit of C. C. Shannon (Exhibit C to Craco affidavit), and letter of Claude S. Brinegar (Exhibit E to Craco affidavit)
   j. Plaintiffs' motion for summary judgment, dated April 16, 1974
   k. Intervenors' motion for summary judgment, dated April 16, 1974
   l. Defendants' motion for summary judgment, dated May 24, 1974
   m. Affidavit of John W. Ingram, dated May 23, 1974 (as amended by affidavit of May 30, 1974)
4. Papers in *Smith* v. *United States, et al.*, Docket No. 74-1107:
   a. Docket entries
   b. Complaint, dated January 25, 1974
   c. Answer of all defendants, dated March 11, 1974

d. Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the Property of Penn Central Transportation Company, Debtor, for leave to intervene, dated April 3, 1974

e. Answer of Penn Central Trustees, dated April 3, 1974

f. Order granting Penn Central Trustees leave to intervene, dated May 3, 1974

g. Stipulation of plaintiff and defendants as to factual matters, dated April 1974

h. Caption of stipulation as to record, noting that it is identical to item 3h

i. Caption of affidavit of John W. Ingram, dated May 23, 1974 (as amended), noting that it is identical with item 3m

j. Motion by plaintiff to strike affidavit of John W. Ingram, dated June 3, 1974

k. Plaintiff's motion for summary judgment, dated April 29, 1974

l. Intervenors' motion for summary judgment, dated May 10, 1974

m. Defendants' motion for summary judgment, dated May 24, 1974

n. Caption of affidavit of Jerome E. Sharfman, dated May 10, 1974, together with Exhibit A thereof, noting that it is not printed but appears in the Joint Documentary Submission as Item 60

5. Papers in *Penn Central Co.* v. *Brinegar, et al.*, Docket No. 74-1149:

a. Docket entries

b. Complaint, dated January 1974

c. Answer of all defendants, dated March 6, 1974

d. Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the Property of Penn Central Transportation Company, Debtor, for leave to intervene, dated April 3, 1974

e. Answer of Penn Central Trustees, dated April 3, 1974

f. Caption of affidavit of John W. Ingram, dated May 23, 1974 (as amended), noting that it is identical with item 3m

g. Order granting Penn Central Trustees leave to intervene, dated May 16, 1974

h. Plaintiff's motion for summary judgment, dated May 22, 1974

i. Intervenors' motion for summary judgment, dated May 20, 1974

j. Defendants' motion for summary judgment, dated May 31, 1974

k. Caption of stipulation as to the record, noting that it is identical to item 3h

l. Stipulation of plaintiff and defendants as to factual matters, dated June 4, 1974

m. Supplementary joint documentary submission of plaintiff, defendants and intervening defendants, together with Exhibits A and B, dated May 31, 1974

6. All notices of appeal

7. The text of the Regional Rail Reorganization Act of 1973

II

Material From the Record to Be Lodged With the Clerk in Ten Copies

1. All items in joint documentary submission (items 1 through 61 inclusive), except items 32, 33, 59 and 61, which are printed in Joint Appendix

2. Report of Secretary of Transportation, dated February 1, 1974, pursuant to Section 204

3. Report of Rail Services Planning Office (ICC), dated May 2, 1974, pursuant to Section 205(d)(1)

4. Transcript of record of 120-day hearing in Penn Central Transportation Company case, pp. 11,106-11,270

5. Transcript of hearing before 3-judge court on motions for summary judgment

6. List of applications for abandonment filed by Penn Central Transportation Company with the United States Railway Association

7. Response by United States Railway Association to abandonment applications.

/s/ Louis A. Craco
Attorney for plaintiffs in Connecticut General, et al. v. USRA, Docket No. 74-189

/s/ Joseph Auerbach
Attorney for Richard C. Smith, plaintiff in Docket No. 74-1107

/s/ David Berger
David Berger, Attorney for plaintiff Penn Central Company in Docket No. 74-1149

/s/ William R. Perlik
Attorney for defendant United States Railway Association

/s/ James F. Dausch
Attorney for defendants Brinegar, Stafford, Schultz, Interstate Commerce Commission and United States of America

/s/ Charles A. Horsky
Attorney for intervening defendants

Dated: July 31, 1974

Opinions

of

United States District Court

for the

Eastern District of Pennsylvania

And Related Opinions

by the

Penn Central Reorganization Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

Before: ALDISERT, *Circuit Judge*, and FULLAM and BECHTLE, *District Judges*.

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

These cases present the question whether an injunction should issue restraining the enforcement of certain provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§743-744, because of constitutional infirmities. Three-judge courts have been convened pursuant to 28 U.S.C. §§2282, 2284, and the matters are consolidated for disposition on cross-motions for summary judgment. The Connecticut General plaintiffs are owners of mortgage bonds and are corporate trustees or successor corporate trustees under indentures, mortgages and deeds of trust of the Penn Central Transportation Company and certain of its lease lines which together comprise the "Penn Central System."[1] Plaintiff, Richard

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[1] The following plaintiffs own the approximate principal amounts of mortgage bonds of Penn Central and of certain Lessors secured by mortgages on rail properties and other properties of Penn Central and certain Lessors set forth opposite their respective names:

a.	Connecticut General Insurance Corporation	$ 31,025,000
b.	Connecticut Mutual Life Insurance Company	9,985,000

(Cont'd)

Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor, is the registered holder of divisional mortgage bonds of Penn Central Transportation Company.[2] These bonds are secured by a divisional mortgage comprising a first lien attaching certain real property, railroad tracks and improvements of the Penn Central Transportation Company. Plaintiff, Penn Central Company, is the owner of 100% of the stock in and is a creditor of the Penn Central Transportation Company, Debtor.

The defendants are the United States Railway Association, a corporate entity established under Section 201 of the Act, 45 U.S.C. §711; the Secretary of Transportation; the Chairman of the Interstate Commerce Commission; the Secretary of the Treasury; and the United States of America. Penn Central Trustees, Intervening Defendants, are presently operating the Penn Central Railroad under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, in this court at Bankruptcy No. 70-347.

(Footnote 1 cont'd)

c.	The Equitable Life Assurance Society of the United States	$147,509,000
d.	Metropolitan Life Insurance Company	69,687,000
e.	The Prudential Insurance Company of America	35,395,000

[2] Plaintiff, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor in reorganization under Section 77 of the Bankruptcy Act ("New Haven Trustee" and "New Haven" respectively) is the registered holder of $34,025,800 principal amount of 5% Divisional Mortgage Bonds ("Bonds") of Penn Central Transportation Company, Debtor.

While plaintiffs challenge the constitutionality of the 1973 Act with a galaxy of arguments, their central contentions may be summarily outlined:

1. The 1973 Act ultimately requires a permanent taking of their property for which they are entitled to be paid in cash instead of stocks and other securities; that the conveyance procedures offend procedural due process; and that a deficiency judgment against Conrail provides no assurance that just compensation would be paid.

2. The 1973 Act violates the geographical uniformity requirement of Article I, Section 8, Clause 4 of the United States Constitution.

3. The 1973 Act effects an interim taking of their property by requiring continued rail operation pending implementation of the Final System Plan.

I.

Before consideration of these contentions, a short summary of the Act is necessary. The judicial panel on multidistrict litigation described it as "an heroic attempt" by Congress to solve a complex and deeply rooted problem. Eight major railroads in the Northeast and Midwest are undergoing reorganization pursuant to Section 77 of the Bankruptcy Act. Of these eight, seven are the only Class I railroads, those with $5 million or more of annual revenue, in the United States in reorganization. "Reasons cited for this [Northeast railroad] crisis were competition from 90 million automobiles and multiple schedules of competitive jet air service which directly competed with passenger transportation. The decline of railroad freight business also diminished the passenger carrying capabilities

of the railroads. Traditional railroad freight business was lost to inland water way operations, pipelines and trucks. Moreover, government policy tended 'to favor non-rail transportation and perpetuate a regulatory climate that [was] hostile to experimentation.' Water, air and highway transportation were successfully aided through public investment, at little or no user cost while railroads had to make such investments on their own."[3]

Congress first responded to the rail crisis with the Emergency Rail Services Act of 1970, 45 U.S.C. §661, *et seq.*, authorizing the Secretary of Transportation to guarantee up to one hundred twenty-five million dollars in certificates issued by trustees of railroads in reorganization under Section 77. However, detailed treatment of the railroads' particular difficulties did not emerge until the enactment of the 1973 Act. As stated in the defendants' brief:

> The 1973 Act represents Congress' comprehensive response to the long-range problems of railroads that own or operate most of the trackage in the Northeast and Midwest, and which therefore constitute a vital segment of the U.S. railroad system and an important segment of the U.S. economy.
>
> The Act requires the United States Railway Association . . . to design a [Final System] [P]lan for reorganized rail services in the Region . . . and provides, among other things,

[3] *In re Central Railroad Company of New Jersey*, 485 F.2d 208, 217 (Aldisert, J., dissenting) (footnotes omitted), citing, *inter alia*, Staff Report, "The Penn Central and Other Railroads," Senate Committee on Commerce, December, 1972, at 220-222.

> that a new private railroad, the Consolidated Rail Corporation ("Conrail") shall acquire, own and operate rail properties pursuant to the Final System Plan.

(Brief, 10-11)

> Congress also provided in the 1973 Act several kinds of financial assistance, new in form and substantial in amount, each intended to assist in creating and implementing the overall plan for rail transportation service in the Region and the Conrail portion of that plan in particular. Four of these additional resources deserve special mention. (i) Substantial obligational authority is conferred on USRA. To carry out its purposes under the Act (principally to plan the new rail system and to provide part of the consideration for rail properties acquired by Conrail under the Act), USRA is authorized to issue $1.5 billion in securities to be guaranteed by the Secretary of Transportation. Section 210. Of this sum, not more than $1 billion may be issued to Conrail, of which not less than half must be used by Conrail for rail rehabilitation and modernization. Section 210(b). Additional amounts may be issued if approved by joint resolution of Congress. *Id.* (ii) The Secretary of Transportation, with USRA's approval, is authorized to enter into agreement for the acquisition, maintenance or improvement of property that will be in the Final System Plan; for this purpose, the Act provides obligational authority of $150 million. Section

215. (iii) To meet emergency needs pending implementation of the Final System Plan, the Secretary of Transportation is further authorized to make payments not exceeding $85 million to the trustees of railroads in reorganization. Section 213. (iv) Finally, the Secretary of Transportation and the Association may provide subsidies for continuing non-economic service and loans for the acquisition and modernization of rail properties. Sections 402 and 403.

(Brief, 12-13).

Section 207(b)[4] of the Act sets forth the procedure by which a railroad becomes subject to the transfer provisions contained in the Final System Plan. The Section 77 Penn

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4 SEC. 207

* * *

(b) APPROVAL. – Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be

(Cont'd)

Central reorganization court has already determined that Penn Central is not reorganizable "on an income basis within a reasonable time under Section 77 of the Bankruptcy Act." The next step under the Act is the "180-day" determination by that court as to whether "such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation." This hearing was held on June 10, 1974, but no findings have yet been made.

(Footnote 4 cont'd)

reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court.

Within 420 days after January 2, 1974, a Final System Plan must be prepared by the executive committee of the Association and submitted for approval by its Board of Directors. Section 207(c). Yet final review of the Plan remains with Congress. Section 208(a). A Special Court has been created to "exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The Special Court shall have the power to order the conveyance of rail properties of railroads, leased, operated, or controlled by a railroad in reorganization in the region." Section 209(b).[5]

The Association is required to deliver a copy of the Final System Plan to the Special Court. Section 209(c).[6] Thereafter, the Special Court shall order the trustees to

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[5] Members of the Special Court selected by the judicial panel on multi-district litigation, as provided by Section 209(b), are Circuit Judges Henry J. Friendly and Carl McGowan, and District Judge Roszel C. Thomsen.

[6]

SEC. 209

• • •

(c) Delivery of Plan to Special Court. – Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court –

(1) which rail properties of the respective railroads in reorganization in the region and of any railroad leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation, in accordance with the final system plan;

(Cont'd)

convey to Conrail "forthwith . . . all right, title and interest in the rail properties. . . ." Section 303(b).[7]

(Footnote 6 cont'd)

(2) which rail properties of the respective railroads in reorganization in the region or railroads leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

[7] SEC. 303. (a) Deposit With Court. – Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(c) of this Act –

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a rail-

(Cont'd)

After the conveyance, the Special Court reviews the terms of the exchange as set forth in the Final System Plan. In

(Footnote 7 cont'd)

> road leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.
>
> (b) Conveyance of Rail Properties. – (1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 209(d) of this Act.
>
> (2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passen-

(Cont'd)

remedying any inadequacy of consideration which it finds, that court is permitted to reallocate Conrail's securities

(Footnote 7 cont'd)

> ger service or any lien or encumbrance of no greater than 5 years, duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.
>
> (3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made subject thereto; and the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lessee under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)).
>
> (4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation or the profitable railroad to whom the conveyance is made assumes all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(Cont'd)

among the various bankrupt estates, to order the provision by Conrail of further securities of Conrail or obli-

(Footnote 7 cont'd)

(c) Findings and Distribution. – (1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide –

(A) whether the transfers or conveyances –

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation in exchange for the securities and other benefits accruing to such railroad as a result of such exchange, as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to a profitable railroad operating in the region, in accordance with the final system plan.

are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and

(Cont'd)

gations of the Association as designated in the Final System Plan and, ultimately, to enter a deficiency judg-

(Footnote 7 cont'd)

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization, which has transferred rail properties pursuant to the final system plan, it shall –

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the transfer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a prof-

(Cont'd)

ment against Conrail should these steps prove insufficient to pay the estates their "constitutional minimum."

(Footnote 7 cont'd)

itable railroad operating in the region in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad. If the special court finds that the terms of one or more conveyances or exchanges for securities or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad so as not to exceed the constitutional minimum standard of fairness and equity.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, obligations, and compensation deposited with it under subsection (b) of this section to the trustee or trustees of each railroad in reorganization in the region who conveyed right, title, and interest in rail properties to the Corporation and the respective profitable railroads under such subsection.

(d) Appeal. – A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: Provided, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

II.

We first dispose of plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation.[8] Plaintiffs argue that the provision for compensation for the conveyance of Penn Central assets renders the Act unconstitutional on its face because the compensation provided in the Act is not payable in money or other legal tender, because the purported safety valve in a deficiency judgment against Conrail provides no assurance that just compensation will be paid, and because these procedures offend procedural due process.

We do not meet these Fifth Amendment questions because we are persuaded that these issues are premature. "Courts do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring). It has been said that a number of jurisprudential rules underlie this general principle. The doctrines of "standing", "ripeness", "finality" and "mootness" all serve "the primary conception that federal judicial power is to be exercised to strike down legislation . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman*, 367 U.S. 497, 503-04 (1961). We believe that the present circumstances do not present a ripe controversy because the basis of

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[8] In addition to the mandatory conveyance provision of the Act, Congress provided that the conveyances be made "free and clear of any liens and encumbrances" subject to limited exceptions. Section 303(b)(2).

plaintiffs' complaint depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations." *Eccles v. Peoples Bank*, 333 U.S. 426, 432 (1948).

Before the plaintiffs may be harmed by the mandatory conveyances, certain contingencies must occur. First, the Penn Central reorganization court must decide "whether or not such railroad shall be reorganized by transferring some of its rail properties to the Corporation pursuant to the provisions of this Act." Section 207(b). Although the court conducted a hearing on June 10, 1974, no findings have been made. Second, the board of directors of the Association must deliver the Final System Plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate for approval. Section 208(a).[9] Third, after Congressional approval, the conveyances take place only at the direction of the Special Court within ten days after deposit of the consideration by Conrail. Section 303(b).

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9 SEC. 208(a) GENERAL. – The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such period stating that it does not favor the final system plan.

Thus, before plaintiffs can be exposed to the alleged harm, there must be a judicial determination by a Section 77 reorganization court followed first by Congressional action, and finally judicial action by the Special Court. Faced with this triple contingency, the plaintiffs cannot be said to have been exposed to harm. Until these contingencies occur, only an abstract issue appears; and "abstract issues do not invoke the jurisdiction of the courts." *McCahill v. Borough of Fox Chapel*, 438 F.2d 213, 215 (3d Cir. 1971). "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947) (footnote omitted).

We are persuaded that the teachings of *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961), and *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), control the issues dealing with the ultimate conveyance of railroad properties. In *Communist Party* the Court ruled that the mere possibility of Section 7(h) of the Subversive Activities Control Act and a regulation issued thereunder affecting the officers of the Party was not sufficient to present a live controversy. "The duties imposed by those provisions will not arise until and unless the Party fails to register. At this time their appearance is wholly contingent and conjectural." 367 U.S. at 106. However, when the Party members subsequently appealed from an order directing them to register under the Act, the Court ruled in *Albertson* that the claims were ripe for adjudication. Accordingly, we conclude that plaintiffs' contention that the conveyance of the rail properties offends the due process clause is not ripe for adjudication.

III.

Article I, Section 8, Clause 4 requires "uniform Laws on the subject of Bankruptcies throughout the United States." Plaintiffs contend that because the Act must be geographically uniform in application, *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902), it is facially unconstitutional because it provides that only rail properties of railroads in reorganization in the "Region" may be designated for transfer to Conrail. Section 206(c)-(d). By definition the Region is limited to seventeen northeastern and midwestern states, the District of Columbia, and certain portions of contiguous states.[10]

The defendants' answer to these arguments is that, insofar as the Act is an exercise of the bankruptcy process, it is uniform: all Class I railroads in reorganization are in

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[10] The Act is entitled "Regional Rail Reorganization Act of 1973." Section 101(b) states:

> (b) PURPOSES. – It is therefore declared to be the purpose of Congress in this Act to provide for –
>
> (1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system. . . .

Section 102(13) declares that " 'Region' means the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order. . . ."

fact located within the defined Region, and there is no discriminatory treatment of creditors within or without the Region. Alternatively, defendants contend that the Region was defined for purposes of statutory provisions based on Congress' power under the commerce clause, which is not subject to requirement of uniformity.

The court is divided on this issue. Judges Fullam and Bechtle are of the view that certain provisions of §207(b) (*see ante* page 10, n. 4) offend the constitutional requirement of uniformity. These provisions mandate dismissal of the Section 77 proceeding if the procedures of the Act are rejected. Their analysis and conclusions are set forth in Part II of Judge Fullam's separate opinion.

For my part, without reaching defendants' alternate contention that the Act finds constitutional support under the commerce clause, I am persuaded that, in the context of the circumstances of this case, the Act does not offend Article I, Section 8, Clause 4.

Hanover Bank instructs that "[t]he laws passed on the subject [of bankruptcies] must, however, be uniform throughout the United States, but that uniformity is geographic and not personal. . . ." 186 U.S. at 188. We believe that the Founding Fathers' requirement of uniformity was mandated to prevent Congressional geographical discrimination of creditors or debtors. But the 1973 Act is geographically uniform with respect to creditors' claims. No provision of the Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism. If there is a facial geographic restriction, it would apply to regional or non-regional debtor railroads only. However, that is not this case. We are not confronted with a proper case or controversy involving a constitutional challenge to the Act brought by a debtor

railroad inside or outside the Region. The challenge is brought by *creditors* within the Region whose claims are treated alike. Accordingly, instructed by the rule of *United States v. Raines*, 362 U.S. 17, 21 (1960) that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional",[11] I do not reach the question of whether the

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11 The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power – "the gravest and most delicate duty that this Court is called on to perform." *Marbury v. Madison*, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *United States v. Wurzbach*, 280 U.S. 396; *Heald v. District of Columbia*, 259 U.S. 114, 123;

(Cont'd)

Act may not survive a constitutional attack brought by a debtor railroad located outside the Region. Thus, I would hold that as to plaintiff-creditors, the Act does not offend the uniformity requirements of Article I, Section 8, Clause 4.

(Footnote 11 cont'd)

Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; *Collins v. Texas*, 223 U.S. 288, 295-296; *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-161. *Cf. Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 537; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558; *Blackmer v. United States*, 284 U.S. 421, 442; *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 54-55; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576; *Tyler v. Judges of the Court of Registration*, 179 U.S. 405; *Ashwander v. TVA*, 297 U.S. 288, 347-348 (concurring opinion). In *Barrows v. Jackson*, 346 U.S. 249, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

362 U.S. at 20-22 (footnote omitted).

IV.

Finally plaintiffs contend that the Act effects a taking of their property by compelling operation of Penn Central's rail properties at an irreversible loss during the period before adoption of the Final System Plan.[12] They urge that "the Act is unconstitutional in that 1) it denies them their present right to terminate their investment in a hopelessly losing railroad; and 2) it provides no assurance that plaintiffs will in all events be paid just compensation on account of such forced continued operations."[13]

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[12] Section 304(f) of the Act provides for interim abandonment if certain conditions are met:

> After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority.

At oral argument the Penn Central Trustees represented that requests for abandonment were filed with the office of the Association, but as of June 3, 1974 – over five months after the effective date of the Act – the office of the Association was not yet fully functioning.

[13] Connecticut General Plaintiffs' Brief, 30. The Penn Central Company contends that an unconstitutional taking of the Penn Central railroad's property occurred on January 2, 1974; that the compulsory continuation of operations during the interim period without payment of just compensation abridges the Fifth Amendment; and that since the debtor estate is being continually depleted, plaintiff, as an unsecured creditor, is presently being injured. Penn Central Company's Memorandum in Support of its Motion for Summary Judgment, 10-14.

That Congress expected losses during implementation of the Final System Plan is evidenced by Section 213 which provides that the Secretary of Transportation may make payments for certain specific interim losses:

> (a) *Emergency Assistance.* – The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act.
>
> (b) *Authorization for Appropriations.* – There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $85,000,000, to remain available until expended.[14]

It becomes quickly apparent that the limited amounts of these funds – available to railroads in reorganization in the region – have not been specially designated to meet challenges of unconstitutional erosion. Moreover, the full statutory authorization has not been appropriated nor is there total agreement between the Secretary

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[14] Significantly there is no explicit reference to the Court of Claims.

of Transportation and the trustees and creditors as to the nature of the payments to be made under Section 213 and those to be made under Section 215.[15] Congress has only appropriated $35 million of the $85 million authorized. By February 19, 1974, a tentative, partial solution was reached between the trustees and the Secretary as to $10.8

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15 SEC. 215. Prior to the date upon which rail properties are conveyed to the Corporation under this Act, the Secretary, with the approval of the Association, is authorized to enter into agreements with railroads in reorganization in the region (or railroads leased, operated, or controlled by railroads in reorganization) for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan. Agreements entered into pursuant to this section shall specifically identify the type and quality of improvements to be made pursuant to such agreements. Notwithstanding section 210(b) of this title, the Association shall issue obligations under section 210(a) of this title in an amount sufficient to finance such agreements and shall require the Corporation to assume any such obligations. However, the Association may not issue obligations under this section in an aggregate amount in excess of $150,000,000. The Secretary may not enter into any agreements under this section until he issues regulations setting forth procedures and guidelines for the administration of this section. The Corporation shall not be required under title III of this Act to compensate any railroad in reorganization for that portion of the value of rail properties transferred to it under this Act which is attributable to the acquisition, maintenance, or improvement of such properties under this section.

million, which required approval by the Section 77 reorganization court. In approving the trustees' petition the court observed:

> Section 215 of the Act authorizes the advance of up to $150 million for the purpose of interim acquisition, maintenance and improvement of rail assets which would eventually be conveyed to the new operating corporation contemplated by the statute, as part of the final system plan (increases in value resulting from such expenditures are not to be reflected in the consideration to be paid for such transfers, and the obligation to repay is to be assumed by the new corporation).
>
> The Secretary has thus far declined to approve any grants under §213, and is not yet in a position to implement §215. To meet the present emergency, the Secretary is apparently willing to use §213 funds, but not on a grant basis. The proposal contemplates that, instead of providing funds to the Trustees to meet operating expenses, the Secretary will, in effect, transfer funds equal to certain current installments due on equipment, and in return acquire a *pro tanto* interest in the Trustees' equity in that equipment. Meanwhile, it is contemplated that the parties will attempt to determine the extent to which §215 funds can appropriately be made available to relieve future cash shortages.

A hearing on the Trustees' petition was held on February 26, 1974. The creditor interests all expressed, in varying degrees, their conviction that the proposed financing was contrary to the intent of the Regional Rail Reorganization Act of 1973, and also would violate the constitutional rights of the creditors. The New Haven Trustee flatly opposes the transaction. Substantially all of the other creditor interests, and the Trustees, expressed their willingness to have the Court approve the transaction, so long as it was clearly understood that this would not create a precedent for similar approvals in the future, and that all parties expressly reserved their rights to press all constitutional and legal arguments at the forthcoming hearings on the issues involved in §207 of the Reorganization Act and in all other proceedings involving their rights under, and the constitutionality of, the statute.

As all parties recognize, unless these funds are provided immediately, the Trustees will be forced to default in the payments due on equipment in which they have an equity in excess of $70 million. Section 77(j) of the Bankruptcy Act severely restricts the power of a reorganization court to preclude equipment creditors from exercising the rights granted under the financing documents. No other source of cash to meet these installments has been suggested (and it is difficult to imagine any alternative source which would not involve repayment,

and thus the same constitutional issues as in the present proceeding).[16]

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[16] *In re Penn Central Transportation Co., Debtor,* Memorandum in Support of Order No. 1480 (March 1, 1974) (pp. 1-3).

Immediately after the enactment of the 1973 Act, the Trustees applied to the Secretary of Transportation for a grant under Section 213, to meet a projected cash shortfall of approximately $12 million anticipated to occur by March 1, 1974. There were three difficulties: (1) the grants were supposed to be made pursuant to regulations prescribed by the Secretary, and the Secretary had not yet prescribed any regulations; (2) The Act requires, as a condition of any such grant, that the recipient agree to maintain rail service at the level of January 2, 1974, and there were problems of interpretation on that, as well as questions about whether the Trustees could make any such commitment in good faith, or without violating the constitutional rights of creditors; and (3) It was the firm position of the Secretary of Transportation that the preferred vehicle for interim financing would be loans for capital improvements under Section 215, rather than grants under Section 213.

There were, however, many problems standing in the way of use of any Section 215 money. (These funds, to be used for capital improvements and acquisitions, are in effect loans made to Conrail, in advance of its coming into existence.) In addition to the fact that such capital improvements were to be limited to the rail properties which would be designated in the Final System Plan, and which were therefore not presently identifiable, there would be no money available under Section 215 until United States Railway Association had been formed and could issue government-guaranteed debt securities.

By February 19, 1974, a proposal for a patchwork solution had been worked out between the Trustees and the Department of Transportation. The DOT would put up $10.8 million, by directly meeting certain installment payments due on equipment, and would be subrogated, *pro tanto,* to the Trustees' equity in that equipment. In effect, the Trustees would sell a part of their equity in certain rail equipment to the Department of Transportation, but with the right

(Cont'd)

A.

Our first responsibility is to determine whether the interim erosion issue is presently ripe for adjudication. The predicate of this issue is that, absent permissive interim abandonment, the Act mandates continued operations of Penn Central until the Final System Plan is adopted. Plaintiffs contend that a compulsory interim operation for a virtually indefinite length of time at large operating losses continues to erode the Penn Central estate so as to constitute a condemnation of the assets without fair and just compensation. To decide whether this contention presents a ripe, and therefore justiciable, issue requires an overview of the Penn Central operations. A statement of operational losses being sustained by Penn Central, while under Section 77 reorganization, is revealed in the stipulations filed by the parties. During the period that began June 21, 1970, until December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000.00.[17]

(Footnote 16 cont'd)

to redeem it by paying back the money without interest. A hearing was held on this proposal on February 26, 1974, and the Section 77 reorganization court approved it, over the objections of various creditors, by Order No. 1480. In a Supplemental Memorandum and Order (No. 1509) the court denied a motion for reconsideration. The orders are now under appeal.

Thus, of the $35 million thus far appropriated under Section 213 of the Act, $10.8 million has been expended to purchase a part of Penn Central's equity in some of its equipment.

[17] During this same period, the Penn Central trustees expended in operating rail properties approximately $137,500,000 of non-recurring cash items as follows:

Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000

(Cont'd)

It is also stipulated that for the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. As previously stated, the Penn Central reorganization court has ruled that the railroad is not "reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act."

(Footnote 17 cont'd)

Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from sale of stock of Madison Square Garden Corp.	2,400,000
Proceeds from sale of securities held in Contingent Compensation Fund	6,500,000
TOTAL	$137,500,000

They expended $2,100,000 in proceeds from sale of mortgaged properties in connection with the Selkirk Yard improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan.

They expended in operating rail properties approximately $157,000,000 in income derived from Penn Central's non-rail properties.

They deferred payment of approximately $241,000,000 in state and local taxes, of which some $44 million to $48 million is allocable to the pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses.

They deferred payment of approximately $101,000,000 in rentals on leased line properties. The deferred leased line rentals are included in the ordinary net losses.

The book value – and we emphasize that this is not a market value or liquidated value – of total assets is recorded as $4,419,917,759 as of December 31, 1971.[18] The trustees report that as of December 31, 1971, 26,254 claimants filed Proofs of Claim, claiming a gross amount of $3,348,620,840.[19] Fifty-one secured creditors filed timely proofs of claim in the amount of $1,062,734,988. Ten indenture trustees filed claims in the amount of $963,135,138. Thirty-five individual bondholders claimed $81,911,646. Six claimants filed claims arising from conditional purchases of equipment and property in the amount of $17,688,204. An accountants' report indicates that on June 21, 1970, the long-term debt in respect of mortgage bonds and collateral trust bonds, exclusive of railroad equipment obligations, was $687,692,000.[20] This, of course, is only a partial listing of the claims.[21] A single

18 Annual Report to ICC, 1971, p. 8.

19 Trustees' Plan for Reorganization, April 1, 1972, Attachment 5, pp. 6-7 (Doc. No. 3033). The trustees estimate an aggregate liability of $1,583,076,820 from the *filed* claims.

20 *Ibid.*, at 14-15.

21 In addition to the filed claims there is the matter of priority claims incurred against the estate during the Section 77 reorganization proceedings:

> E. Growth in priority claims against the estate.
>
> Deprived of an adequate cash flow, the Penn Central estate has accumulated substantial priority claims ahead of all pre-bankruptcy interests. Conservatively estimated, these priority claims already aggregate at least $300 million. On a status quo
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> (Cont'd)

unsecured creditor in these proceedings, the Penn Central Company, claims an approximate amount of $41,800,000.

The Court of Appeals for the Third Circuit suggests: "If, as some of the reports filed by the trustees suggest, it is already clear that such a reorganization is not feasible,[11] then this reorganization is already at the point where the erosion of the estate in deficit operations must cease and a liquidation alternative must be considered if

11 *See, e.g.*, Trustees' Interim Report of February 1, 1973; Memorandum accompanying July 2, 1973 Plan of Reorganization of the Penn Central Transportation Company and Other Railroad Corporations (June 29, 1973)."[22]

(Footnote 21 cont'd)

> assumption, another $100 million would be added in 1973. As a result, the value of the estate has already been substantially eroded and the Trustees are presently unable to prevent continuing erosion. In addition to these items, there is a priority charge of some $200 million a year for interest and amortization of equipment debt and equipment lease rentals which must continue to be serviced out of future cash resources whether or not such charges are earned.
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> There is, simply, not enough cash to cope with continuing claims and to embark upon the capital improvement programs which would permit a continuation of service improvements. Not only is the ability to preserve earning power jeopardized, but Penn Central's essential public services cannot be sustained on this basis.
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Trustees' Interim Report of January 1, 1973, p. 4 (Doc. No. 4911).

22 *In the Matter of Penn Central Transportation Co., Debtor*, (Columbus Option Cases), 494 F.2d 270, 283 (3d Cir. 1974).

the secured creditors or other interested parties insist upon such consideration."

Over a year ago the Section 77 reorganization Court warned: "1. *Erosion.* While the precise calculations have not been fully developed, the record justifies the conclusion that post-reorganization deferrals and unpaid administration claims have already eroded the Debtor's estate to the extent of about $500 million. Whether the constitutional limit has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived. . . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973." *In re Penn Central Transportation Company*, 355 F. Supp. 1343, 1344, 1346 (E.D. Pa. 1973).

Cognizant of massive operational losses of $851,000,000 during the present reorganization proceedings, and cognizant also that unsecured creditor as well as secured creditor interests are squarely before this court, we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication. Having determined that there is a controversy ripe for adjudication, we now examine the merits of plaintiffs' contention.

B.

The defendants acknowledge that if a point is reached where continued loss operations during the interim amount

to an unconstitutional taking,[23] the Act does not explicitly provide for the payment of just compensation. They insist, however, that plaintiffs have an implied remedy at law – a suit in the Court of Claims under the Tucker Act, 28 U.S.C. §1491, for just compensation from the United States. The Tucker Act confers jurisdiction on the Court of Claims:

> to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation or an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[24]

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23 [T]here are limits beyond which . . . [the] public interest cannot be served without violating the constitutional prohibition against appropriation of private property for public use without just compensation. New Haven Inclusion Cases, 399 U.S. 392, 90 S. Ct. 2054, 26 L.Ed.2d 691 (1971); *cf.* Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396, 40 S. Ct. 183, 64 L.Ed. 323 (1920). These limitations are measured both in terms of the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and in terms of the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise.

In Re Penn Central Transportation Company, 347 F. Supp. 1346, 1366 (E.D. Pa. 1972).

24 The district courts have concurrent jurisdiction of claims not exceeding $10,000. 28 U.S.C. §1346.

The applicability of the Tucker Act is vital to the defendants' position. At oral argument counsel conceded that if a point was reached at which continued mandatory operations created losses of such an amount as to constitute a Fifth Amendment taking, the operators would then be entitled to just compensation, and that without an implied Court of Claims remedy, the 1973 Act would be unconstitutional as to these plaintiffs.[25]

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25 JUDGE ALDISERT: All right now, Mr. Cutler, assuming an unconstitutional taking by means of continued interim operation, without a Tucker Act remedy, would the 1973 Act be unconstitutional?

MR. CUTLER: You are saying assuming that a point might be reached before the consummation of the new plan in which the constitutionally permissible point of erosion had been reached, before that could be carried out?

JUDGE ALDISERT: Yes, sir.

MR. CUTLER: And that a Tucker Act remedy was not available?

JUDGE ALDISERT: Yes.

MR. CUTLER: I think I would answer that, Judge Aldisert, by saying under those circumstances, Congress would then have decreed a taking by the provision of this Act for which it had removed any adequate remedy at law by way of the Tucker Act suit. In that case, the Act as a whole would probably be unconstitutional. We would agree with that.

We think it would be possible at that point though to save most of the Act by construing I think it is 303 where the court is required to transfer the properties before it has passed on the value of what is to be given in exchange, by construing that as unconstitutional, that particular provision,

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The defendants concede that the United States, as sovereign, may not be sued without its consent. "[T]he terms of its consent to be sued in any court define that

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(Footnote 25 cont'd)

and saving the rest of the statute under the severability clause, which would have the result that the court could delay the transfer until after it had passed on the values, and as to erosion, if the interim or the final point, the limit of constitutionally permissible erosion, had been reached before the plan was consummated, then I suppose Judge Fullam, as the reorganization judge, and the other judges wou'd be free, since the compulsory transfer would have been struck down as unconstitutional, to terminate the proceedings, if they thought that was appropriate.

R. 68-69.

Penn Central Trustees have expressed a similar position:

B. *Interim Erosion.* Moreover, there is the further objection to the Act already referred to – the lack of any assurance that the estate will be compensated for erosion during the many months which must elapse before Penn Central's rail properties are conveyed. Financial erosion – the accumulation of real estate taxes, interest on secured debt, leased line rentals and a variety of administrative expenses – continues to accumulate at the expense of the owners. Physical erosion, as noted above, is likewise continuing, as the rail properties of the debtor continue to suffer from inadequate maintenance.

The Trustees have been advised that a Tucker Act remedy may be available to them to recover these erosion losses. The Trustees will attempt to secure a Supreme Court ruling that, if a constitutionally impermissible level of erosion was reached

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court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Consent to be sued must be established in an act of Congress, and such an act, "since it is a relinquishment of a sovereign immunity, must be strictly interpreted." *Ibid.*, at 590; *see, United States v. King*, 395 U.S. 1, 4 (1969). Specifically defendants urge that a statutory grant of consent to a suit against the United States for any unconstitutional taking by reason of interim losses is conferred on the Court of Claims by implication because the Regional Rail Reorganization Act of 1973 shows no affirmative Congressional intent to deprive

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(Footnote 25 cont'd)

> by January 2, 1974, the date the Act became law, a "taking" of Penn Central's rail properties occurred at least by that date, and that a Tucker Act remedy exists for erosion occurring thereafter. Section 304 (f) of the Act provides that "after the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, * * *". While the planning agency, the United States Railway Association, may authorize a service to be discontinued or a line to be abandoned (unless local authorities reasonably object), this mandate by Congress has the effect of requiring Penn Central to continue operations – notwithstanding the losses it will incur – until a final system plan is implemented. Again, however, the Trustees are advised that unless and until the Supreme Court has ruled that the United States can be required to reimburse the Penn Central estate for its interim losses, they cannot as fiduciaries rely exclusively on a Court of Claims recovery.
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> Trustees' April 3, 1974 Report on Reorganization Planning, pp. 5-6 (Doc. No. 7304).

that court of its Tucker Act jurisdiction in cases where claims for unconstitutional takings are made.

The plaintiffs counter with a reference to the legislative history to demonstrate that there was a specific intention to limit the obligations of the United States to the express provisions and explicit limitations contained in the Act. Thus the issue is joined, and the solution turns on the vexing problem of statutory construction.

We cannot demean the importance of proper statutory construction in the precise matter at hand. On proper statutory construction stands or falls the constitutionality of important provisions of the statutory schema. The defendants, joined by the intervening Penn Central trustees, mount a formidable argument, reminding us that when "the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that . . . [courts] will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971), citing *Crowell v. Benson*, 285 U.S. 22 (1932) (emphasis supplied). *See also, American Communications Assn, C.I.O. v. Douds*, 339 U.S. 382, 407 (1950); *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 120-21 (1948). The Penn Central trustees emphasize that "the Act contains no fewer than *thirteen* provisions repealing or making inapplicable the provisions of various laws or excluding the jurisdiction of federal courts on various subjects. Since none of these thirteen provisions excludes a Tucker Act remedy – although, as plaintiffs themselves argue, Congress was intensely aware of the possibility of such a remedy – Congress must be deemed to have deliberately rejected the readily available option of including

such an exclusionary provision in the Act."[26]

On their part the plaintiffs also turn to the text of the Act, describing it as "a preemptive system of judicial participation [with] respect to the final system plan. Section

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[26] Penn Central Trustees' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, p. 6.

> The thirteen repealing or jurisdiction-excluding provisions in the Act are found in Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), 304(c), 304(f), 601(a)(2), 601(b) and 601(c).
>
> Sections 202(a)(10) and 205(c)(2) exempt United States Railway Association (USRA) and the Rail Services Planning Office, respectively, from the provisions of Section 3709 of the Revised Statutes, 41 U.S.C., Section 5. Section 206(d)(3) provides that certain determinations by USRA and the ICC shall not be reviewable in any court. Section 207(b) provides that appeals from orders made under that subsection may be taken only to the Special Court, whose decisions are not subject to further review. Section 207(b) also in effect repeals part of the jurisdiction created by Section 77 of the Bankruptcy Act by requiring dismissal of Section 77 proceedings in certain circumstances.
>
> Section 209(a) provides that the final system plan shall become effective after review by Congress "notwithstanding any other provision of law" and is "not subject to review by any court except in accordance with this section." Here Congress provides that no court may review the contents of the final system plan – the document which establishes what railroad properties shall be taken – and that the plan is to become effective notwithstanding any other provisions of law. Obviously nothing here purports or

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209 mandates the empaneling of the Special Court and the consolidation before it of 'all judicial proceedings with respect to the final system plan'. Section 303(c) endows the

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(Footnote 26 cont'd)

> atempts to exclude a Tucker Act remedy for just compensation for the properties so taken.
>
> Section 209(b) authorizes the Judicial Panel on Multi-District Litigation to create a Special Court and to consolidate therein all judicial proceedings with respect to the final system plan, and to issue rules for the conduct of the Panel's functions. The section goes on to provide that "no determination by the panel [on Multi-District Litigation] under this subsection may be reviewed in any court." Here again Congress demonstrated that it well knew how to exclude jurisdiction of federal courts when it wished to do so.
>
> Section 303(b)(2) provides that mandatory conveyances ordered pursuant to the Act by the Special Court "shall not be restrained or enjoined by any court." Section 303(d) provides that, after the Special Court enters its orders with respect to compensation which are authorized by prior subsections of Section 303, an appeal may be taken to the Supreme Court and "that such appeal is exclusive." This makes a single appeal to the Supreme Court the only means by which interested parties may question whether the Special Court has properly performed the functions assigned to it by Section 303. Since those functions do not include consideration of any question whether the compulsory conveyance pursuant to the Act constitutes a taking of property or the amount of just compensation due therefor, section 303(d) in no way attempts to exclude a Tucker Act remedy for such a taking. To the contrary, Section 303(d) yet again demonstrates

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Special Court with the duty to review the consideration to be received for the properties conveyed and ultimately the

(Footnote 26 cont'd)

> that Congress was fully aware of the necessity of excluding various types of jurisdiction and did so expressly when it wished to do so.
>
> Section 304(c) provides that railroad abandonments permitted under the section may be made "notwithstanding any provision of the Interstate Commerce Act" or of other laws. Section 304(f) provides that the inhibition on interim abandonments imposed by that subsection prevails "notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."
>
> Section 601(a)(2) provides that "the antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan where such action was in compliance with the requirements of such plan." Section 601(b) similarly makes inapplicable the provisions of the Interstate Commerce Act "whenever a provision of any such act is inconsistent with this Act." And Section 601(c) provides that certain provisions of the National Environmental Policy Act of 1969 "shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan." These provisions are contained in Title VI of the Act, in a subtitle headed "Relationship to Other Laws." If Congress had wished also to exclude the application of the Tucker Act, it obviously would have added such an exclusion to the very explicit provision of Section 601 excluding the applicability of various other laws."

Ibid., at 6-9 (footnote omitted).

authority under Section 303(c)(2)(C) to enter a deficiency judgment against Conrail. The exclusive appeal from the Special Court's findings is provided in Section 303(d)."[27]

The legislative history reveals that Senator Vance Hartke, who would later be one of the Managers of the bill on the part of the Senate, observed that if Congress did not act by providing the creditors with stock in Conrail, "there is the distinct possibility . . . that a number of these people could make a claim against the Government which could be sustained in the Court of Claims."[28]

Especially significant in the legislative history of the Act are the remarks recorded during the discussion on the conference report accompanying H.R. 9142 in a colloquy between two of the "*Managers* on the Part of the House":

> *Mr.* [Dan] *Kuykendall.* "Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?"
>
> *Mr.* [Brock] *Adams.* "Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this

[27] Connecticut General's Brief, 59-60.

[28] 119 Cong. Rec. S. 23783-84 (1973).

bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees."

* * *

Mr. Kuykendall. "There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?"

Mr. Adams. "The gentleman is correct."

Mr. Kuykendall. "There is no way they can assess the Congress for the money?"

Mr. Adams. "The gentleman is correct."[29]

We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act. Article I, Section 9, Clause 7 provides that no money shall be drawn from the Treasury of the United States except in consequence of an appropriation made by law. Section 213(b), *supra*, and Section 214[30] entitled "Authorization for Appropriations" place an express ceiling on expenditures.

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29 119 Cong. Rec. H. 11876 (1973).

30 SEC. 214(a) SECRETARY. – There are authorized to be appropriated to the Secretary

(Cont'd)

Section 210 describes the maximum obligational authority of the Association, and the authorization for appropriation is limited to "such amounts as are necessary to discharge the obligations of the United States arising *under this section.*" (Emphasis supplied.) Judicial review is delineated with specificity in Sections 209(a) and 303 with no mention of the Court of Claims.

(Footnote 30 cont'd)

for purposes of preparing the reports and exercising other functions to be performed by him under this Act such sums as are necessary not to exceed $12,500,000, to remain available until expended.

(b) OFFICE. – There are authorized to be appropriated to the Commission for the use of the Office in carrying out its functions under this Act such sums as are necessary, not to exceed $5,000,000, to remain available until expended. The budget for the Office shall be submitted by the Commission directly to the Congress and shall not be subject to review of any kind by any other agency or official of the United States. Moneys appropriated for the Office shall not be withheld by any agency or official of the United States or used by the Commission for any purpose other than the use of the Office. No part of any other moneys appropriated to the Commission shall be withheld by any other agency or official of the United States to offset any moneys appropriated pursuant to this subsection.

(c) ASSOCIATION. – There are authorized to be appropriated to the Association for purposes of carrying out its administrative expenses under this Act such sums as are necessary, not to exceed $26,000,000, to remain available until expended.

We were taught by Justice Frankfurter "that the troublesome phase of [statutory] construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye."[31] John Chipman Gray often quoted a sermon by Bishop Hoadley that "[w]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them."[32]

For this court to interpret the Act in a manner contrary to its explicit terms, contrary to the express representations of the bill's managers at the conference committee discussions, and to construe this Act in a manner which will expose the United States Treasury to presently incalculable, but, in any event, substantially formidable claims would be a flagrant violation of the separation of powers doctrine. If we did this, the judiciary would truly have become the "law-giver" for substantial federal appropriations; this in itself would raise serious constitutional problems.

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31 Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

Justice Frankfurter also reminded us that "Mr. Justice Holmes reached meaning easily, as was true of most of his results, with emphasis on the language in the totality of the enactment and the felt reasonableness of the chosen construction. He had a lively awareness that a statute was expressive of purpose and policy, but in his reading of it he tended to hug the shores of the statute itself, without much reinforcement from without," supra, at 532.

32 Gray, NATURE AND SOURCES OF THE LAW, 102, 125, 172 (2d Ed. 1921).

To accept the government defendants' contention would require judicial legislation on a grand, if not arrogant, scale. Justice Holmes told us "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[33] To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particles. We simply lack such power.

V

Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for an erosion of property beyond constitutional limits, offends the Fifth Amendment; that Section 303, the only provision of the Act pertaining to valuation of the railroad estate, in failing to provide a remedy for any unconstitutional erosion caused by mandatory interim operations under Section 304(f), is also defective; that because the effect of Section 207(b) precludes a form of liquidation under Section 77 of the Bankruptcy Act, it is constitutionally defective as set forth in Part II of the separate opinion of Judge Fullam; and that because of these conclusions the United States Railway Association must be enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c).

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33 *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

An appropriate decree will issue (1) enjoining the United States Railway Association, the Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Treasury from enforcing the Regional Rail Reorganizational Act of 1973 in a manner inconsistent with this holding and (2) declaring as null and void designated sections of the Act.

/s/ Ruggero J. Aldisert
Ruggero J. Aldisert
United States Circuit Judge

FULLAM, J.

In view of the number and complexity of the issues which have been presented in this case, it should occasion little surprise that there is a lack of total agreement among judges on all issues. With respect to the issues actually decided by the majority, I am in general agreement, although to some extent for slightly different reasons. But the majority fails to reach a number of issues which I feel must be faced, not only because they are indeed ripe for decision, but because the principal conclusion expressed by the majority – that the Regional Rail Reorganization Act of 1973[1] is unconstitutional because it fails to provide compensation for interim erosion during the planning period – necessarily depends upon an evaluation of the nature and validity of the Act's provisions concerning mandatory conveyance of rail properties to Conrail. In short, I believe the majority has attempted to isolate an issue which cannot be isolated.

I. Prematurity

Plaintiffs challenge the facial constitutionality of the Act on a variety of grounds, not all of which are necessarily ripe for decision. In considering which issues must be faced at this time, it is important to keep in mind the distinctions between concepts of standing, ripeness, and the need for injunctive relief.

Unquestionably, one or more of the parties to these lawsuits have standing to raise every issue which has been presented. That is, the statute affects these parties in

[1] The Regional Rail Reorganization Act of 1973 is referred to in this Opinion as the Act, the RRRA, or the statute.

particular, as distinguished from the public at large, in substantial ways. They thus meet the tests of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Flast v. Cohen*, 392 U.S. 83 (1968).

The question of whether all of the constitutional issues are ripe for decision requires us to analyze the inevitability of the alleged unconstitutional impact, whereas the immediacy of the alleged threat bears upon the propriety of injunctive relief.

By July 1, 1974, each of the reorganization courts will have made, or failed to make, findings pursuant to §207(b) of the Act. Under the statute, the effect of these findings or non-findings (as affirmed or reversed by the Special Court within 80 days thereafter) will be either that the statutory processes will inexorably apply to these estates, or that the § 77 proceedings will be dismissed. The plaintiffs assert that the §207(b) proceedings themselves are unconstitutional on due process grounds. Surely this challenge is now ripe for decision; indeed, the defendants do not contend otherwise.

As set forth in Judge Aldisert's scholarly opinion, the existence and inevitability of staggering losses from continuing rail operations pose an immediate threat to the constitutional rights of the owners and creditors of the bankrupt estates. Plaintiffs contend that the effect of §§304(f) and 303 of the Act is to mandate continued loss operations for an indefinite period without hope of reimbursement, in derogation of both the taking and due process clauses of the Fifth Amendment. Since the majority has concluded that the ultimate conveyance issues are not now ripe for decision, the fact §304(f) has been in force since January 2, 1974, and continues to require in-

terim operations and losses, undoubtedly makes the interim erosion challenge ripe for decision.

Plaintiffs challenge the entire Act as a violation of the uniformity requirement of the bankruptcy clause, Article I, Section 8, Clause 4 of the Constitution. Again, this issue is undeniably ripe for decision.

Finally, plaintiffs pose a series of challenges to the statutory provisions which contemplate the mandatory transfers of rail assets to Conrail or to existing solvent carriers, at prices to be determined by the Special Court after the event, and to be paid in the form of a to-be-determined mixture of Conrail securities, undefined "other benefits," and possibly a limited amount of guaranteed obligations of USRA. Whether some or all of these "ultimate conveyance" issues are now ripe for decision is a more difficult question. Judge Aldisert views the possibility that a conveyance may never take place because of action taken by the reorganization court under §207 (b), the Congress, and the Special Court, as rendering inappropriate consideration of any of the ultimate conveyance issues. For me, the decision of this issue is not so simple.

No one doubts, and in fact the parties have stipulated, that Penn Central rail properties will be included in the Final System Plan. Equally certain is the fact that USRA will deliver to Congress a Final System Plan which is to become effective 60 session-days thereafter. In order to prevent the Plan from taking effect, one House of Congress must act affirmatively by passage of a resolution expressing disapproval of the Plan, §208(a). Section 208(b) makes it the continuing duty of USRA to present final system plans to the Congress until one becomes effective. I cannot equate Congress' reservation of the right to veto the first Final System Plan, or even the second or third, to a sit-

uation in which Congressional action is necessary as a precondition to a Final System Plan becoming effective. I believe this Court must assume that the Act means what it says, and that the expressed intent of Congress would be carried out.

Once a Final System Plan is effective, *i.e.*, when the 60-day Congressional action period expires, the Special Court is required under §303(b) to order conveyance of the property. There remains no discretionary role to be played by the Special Court, or any other court, at that point. Therefore, it is clear that if the reorganization court does not make §207(b) findings that remove the railroad from the RRRA, conveyances are certain, save only amendment or repeal of the RRRA. Of course, the possibility of future legislative and executive action is always present during the judicial evaluation of the constitutionality of a statute, and does not render such adjudication premature.

The last potential exit would be a finding by the reorganization court that the RRRA "does not provide a process which would be fair and equitable to the estate of the railroad in reorganization," §207(b). In this event, there would be no conveyance under the Act. In my view, this possibility does not raise an issue of ripeness, but rather, a question more akin to abstention.

Under §207(b), the reorganization court will have to consider at least some of the cluster of discrete issues concerning the ultimate conveyance provisions of the Act, including some of the constitutional issues raised by these cases. This is so because the reorganization court must consider the RRRA in its entirety in order to ascertain whether the process is fair and equitable to the estates. Moreover, it is highly improbable that a reorganization court could successfully reject the statute as unfair or inequitable under §207(b) for reasons of less than constitutional magnitude. Indeed, the government's position at the June 10 hearing in the reorganization court was that nothing short of unconstitutionality would justify rejection of the Act under §207(b). Thus, the issue is essentially whether it is preferable for the three-judge court to rule on the constitutional issues surrounding the conveyance provisions, either directly or in conjunction with plaintiffs' due process attack on §207(b), before the reorganization courts act under §207(b).

The policies embodied in 28 U.S.C. §2282 appear applicable in this case. Enforcement of major federal legislation is sought to be enjoined. As a practical matter, a decision by the reorganization court under §207(b) that a constitutional infirmity requires the Act to be found not fair and equitable would be equivalent, for all practical purposes, to an injunction that might issue as a result of this three-judge court litigation; and a contrary decision would be equivalent to denial of an injunction. It is preferable that the deliberate and collegial judgment of this three-judge court should determine the constitutionality of the RRRA's conveyancing provisions. It is significant that the government has not contended that the §207(b) hearings operate to render any of the constitutional claims premature.

This is not to say that with respect to many of key constitutional claims the government's contention that there is not an adequate factual record for constitutional adjudication is not sound. Rather, the point is that the government's contentions in this regard should be considered by the Court at this time.

Another aspect of the RRRA's impact that warrants consideration, is the relationship of the availability of the

RRRA's processes to the pending petitions to terminate rail services and to dismiss the Penn Central's § 77 proceeding. Obviously, the RRRA is an important factor to be weighed by the reorganization court in assessing validity of the petitioners' contentions that operations can no longer be constitutionally required. This consequence in and of itself would seem to justify present consideration by this Court of the constitutional issues deferred by the majority.

Irrespective of the validity of the foregoing observations, I am satisfied that, in the final analysis, many of the constitutional issues concerning the mandatory conveyance features of the Act are necessarily ripe for decision at this time because of their relationship to the issues of interim erosion. While it is not necessary to determine whether or not the contemplated transfers would amount to takings in the constitutional sense, requiring advance assurance of payment in cash or equivalent, I am persuaded that the constitutional validity of uncompensated interim erosion cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce.

Stated otherwise, the fact that the statute does not provide compensation for interim erosion as such would not necessarily render the statute unconstitutional if there is reasonable present assurance that the end result of the statutory process would be the receipt of consideration for the assets and other benefits in amounts equaling at least liquidation value plus interim erosion.[2]

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[2] Counsel for the government pressed the point that under the conveyance provisions the Special Court could include in its valuation of Penn Central's property an amount sufficient to compensate the estate for unconstitutional interim erosion. Record 98-99.

II. Uniformity

The Act in its entirety is challenged as violative of the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution. With one minor exception discussed below, I believe that the Act can (and therefore must) be construed in such a way as to render it constitutional. But I reach this result by a somewhat different route than does Judge Aldisert.

Professor Warren tells us:

> ". . . any National law which deals with inability to pay debts and which is uniform throughout the country is a law 'on the subject of bankruptcy.'" Charles Warren: *Bankruptcy in United States History* (Harv.U.Press 1935), at p. 8.

For more than half a century, attempts to achieve national bankruptcy legislation were severely hampered by the widely held belief that the Constitution required that bankruptcy litigation must be uniform in its application to all classes (*ibid*, p. 61). However, the Supreme Court eventually decided that the requirement was geographical. *Hanover National Bank v. Moyses*, 186 U.S. 181, 190.

It has been stated that the uniformity requirement

> ". . . is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the state in which the bankruptcy court sits." *Vanston Bondholders Protective Committee v. Green, et al.*, 329 U.S. 156, 172 (Frankfurter, J., concurring).

Taken literally, that statement would seem to vindicate the statute here involved, since this Act unquestionably permits all claims against the affected bankrupt railroads to be treated alike, irrespective of the situs of particular creditors or particular courts. But bankruptcy legislation affects debtors as well as creditors, and it seems doubtful that the quoted language was intended to suggest that different treatment based upon the geographical location of the debtor would be permissible under the uniformity clause.

The fact is, the Supreme Court has never had occasion to consider a statute which was not geographically uniform. The few reported decisions have all dealt with variations in state laws respecting property rights (*e.g.*, exemption), or the application of nationwide standards to particular factual situations determined by courts. *See Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937).

While Congress' power to classify debtors is not open to question at this late date, *see In re Baltimore & Ohio R.R. Co.*, 29 F.Supp. 608 (D.Md. 1939), *cert. denied* 309 U.S. 654 (1940); *In re Chicago, Rock Island & Pacific Ry.*, 72 F.2d 443, 450 (7th Cir. 1934), *aff'd* 294 U.S. 648 (1935), that power may not be exercised on the basis of geography.

I cannot accept the notion that only those debtors not affected by the statute can have standing to challenge the lack of geographical uniformity. In my view, every railroad subject to the statute has standing to make that challenge, and so do creditors of such railroads. The Penn Central interests are not complaining that the Act is validly applied to others and not to Penn Central; the contention is that an invalid, non-uniform statute is being applied to Penn Central.

Neither do I accept the government defendants' argument that the statute is in fact uniform because all Class I railroads now in reorganization are located in the region defined in the statute. The statute is not limited to Class I railroads, and it is not, apparently, limited to railroads which were in reorganization on the effective date of the Act.[3]

But I do find it possible to uphold the statute as an exercise of Congress' powers under the commerce clause. The essential features of an exercise of the bankruptcy power are that it deals with adjustment of the respective rights of embarrassed debtors and their creditors, and that impairment of the obligation of contracts is permissible. *Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648 (1935); *Hanover National Bank v. Moyses, supra.* Stated otherwise, recourse to the bankruptcy clause to justify Congressional action is necessary only if that action impairs the obligation of contracts.

For the most part, the statute under discussion adds nothing, in that respect, to the powers already granted to reorganization courts under the geographically uniform and admittedly valid provisions of §77 of the Bankruptcy Act. To some extent, those powers are transferred to the Special Court, but this is surely permissible under Article III of the Constitution. The ultimate dispositions of the respective rights of debtors and creditors are to be made under §77. Authority to order conveyances free

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[3] By implication, it appears that the statute could not affect a railroad unless it was in reorganization on January 2, 1974, or entered reorganization within 180 days thereafter. Whether there are any railroads in the latter category does not appear.

and clear of liens, and to "cram down" a plan of reorganization, already exists under §77, and is not newly created or added by the 1973 Act.[4]

Therefore, in my view, since the principal provisions of the 1973 Act which depend upon the bankruptcy power for their validity are merely repetitive of similar provisions in existing, valid, laws, the statute as a whole does not violate Article I, Section 8, Clause 4 of the Constitution.

There is, however, one provision of the Act which is clearly an exercise of Congressional power derived solely from the bankruptcy clause, and which cannot be found in existing, uniform, legislation. I refer to the provisions of §207(b) which mandate dismissal of the §77 proceeding if the procedures of the Act are rejected. At first blush, this might seem relatively innocuous: Since the particular debtors have been found to be incapable of reorganizing "on an income basis" under §77, dismissal of the §77 proceeding might be thought to follow as a matter of course.

But a §77 proceeding may properly lead to results other than a "normal" income-based reorganization of a railroad as a railroad. The *New Haven Inclusion* case, 399 U.S. 392 (1970), stands as a prime example of a type of reorganization designed to produce permanent withdrawal of the debtor from common carrier operations. There, the

[4] As discussed in Part IV, *infra*, the RRRA does sharply alter the procedural, and perhaps substantive, foundation upon which these existing bankruptcy powers have traditionally been exercised. Although the question is a close one, I have concluded that these departures are not necessarily a sufficient basis for invalidating the entire Act on uniformity grounds.

rail assets were disposed of, with a view toward reorganizing the enterprise as an investment holding company. The plan of reorganization was approved by the ICC, the reorganization court, and the Supreme Court.

It thus appears that §77 can be used to produce a form of liquidation, at least where the plan contemplates that the bulk of the rail properties will continue to be operated as a railroad by someone. The provisions of §207 (b) of the Act seem to preclude that kind of recourse to §77. Since this partial repeal of §77 of the Bankruptcy Act applies only to debtors in the geographical region specified in the statute, and since that feature of the Act is plainly a law "on the subject of bankruptcy," I am forced to conclude that the Act is, in that one respect, violative of Article I, Section 8, Clause 4 of the Constitution. Indeed, it seems probable that that same portion of §207(b) is vulnerable on due process and equal protection grounds, and perhaps on the ground of separation of powers as well.

III. Underlying Principles and Background

In order to evaluate the constitutional permissibility of interim erosion in light of the constitutional adequacy of the end result, it is helpful to review briefly the legal theories underlying the reorganization provisions of the Bankruptcy Act, and their application to the Penn Central proceedings apart from, and in relation to, the RRRA itself.

A.

Reorganization of financially embarrassed debtors pursuant to a plan that is feasible, fair and equitable is beneficial to both public and private interests. Underlying the

reorganization process is the simple economic fact that the intangible values inherent in a going concern will be lost if individual creditors are completely free to exercise their rights to foreclose on the physical assets of the enterprise.

> "One of the purposes of §77B was to avoid the consequences to the debtor and creditors of foreclosure, liquidation and forced sales with their deflationary effects." *Case v. Los Angeles Lumber Products*, 308 U.S. 106, 124 (1939) (Douglas, J.)[5]

See also R.F.C. v. Denver & Rio Grande Western R.R. Co., 328 U.S. 495, 508 (1945). If the reduction in values associated with forced sales can be avoided, and going concern values wholly or partially preserved, many junior interests which would have been wiped out by liquidation (junior secured, unsecured and equity interests) may participate in the plan. *See generally*, Blum, *The Law and Language of Corporate Reorganization*, 17 Univ. of Chicago L.R. 565 (1950). The medium of exchange is, of course, new corporate securities of the surviving entity.

Allocation of the new securities poses both practical and theoretical problems. The theoretical difficulty involves the method of recognizing the respective priorities of the various claimants. Section 77(e)(1) is the pertinent statutory provision:

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[5] §77B was a general corporate reorganization statute enacted in 1934, one year after §77, but superseded in 1938 by Chapter X of the Chandler Act.

> "The judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section [77], is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

As Mr. Justice Douglas observed, in *Case v. Los Angeles Lumber Products, supra:*

> "The words 'fair and equitable' . . . are words of art which prior to the advent of §77B had acquired a fixed meaning through judicial interpretation in the field of equity receivership reorganization." 308 U.S. at 115.

The substance of the fair and equitable test is derived from *Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913), in which the Supreme Court established what has become known as the absolute priority rule. Simply put, the absolute priority rule requires that "once a hierarchy of interest is established, each class must receive 100% satisfaction before the next lower class may participate at all." Friendly & Tondel, *The Relative Treatment of Securities in Railroad Reorganizations under §77*, 7 Law & Contemporary Problems 420, 423 (1940). Yet, claims may be satisfied in whole or in part by securities of a character inferior to those originally owned by the claimant, so long as junior claimants are not permitted to participate unless and until the senior claimants receive under the plan the equitable equivalent to their entire panoply of rights under their original debt instruments. *Consolidated Rock*

Products v. DuBois, 312 U.S. 510 (1941); *Ecker v. Western Pacific R.R. Corp.*, 318 U.S. 448 (1943); *Group of Institutional Investors v. Chicago, Minneapolis, St. Paul & Pacific R.R. Co.*, 318 U.S. 523 (1943).

Basic to the application of the absolute priority rule is the valuation of the enterprise and the determination of value of the security underlying purportedly secured claims. Both §77(e) and the Supreme Court's pronouncements in the *Consolidated Rock Products, Ecker*, and *Institutional Investors* cases require that earning power or income-generating capacity of the debtor be the measure of a railroad's value. Once the earning power has been established, the aggregate capitalization of the new capital structure is derived from the earning power. Although §77 does not contain an explicit requirement that the reorganization plan be feasible (in the sense that the new capital structure is such that a viable entity will survive the reorganization process), the Interstate Commerce Commission's duty under §77(d) to formulate a plan that is in the public interest has been read to include this requirement. *Group of Institutional Investors v. Chicago, Minneapolis, St. Paul & Pacific R.R. Co.*, 318 U.S. 523, 544-45 (1943).

Congress has invested the judiciary with powerful tools for the effectuation of §77 reorganizations. Preservation of the *status quo* can be insured by the prudent exercise of the stay provisions of §77(j). Trustees' certificates having priority over secured debt may be issued pursuant to §77(c)(3) to obtain interim working capital. Executory contracts may be rejected by the trustee or in the plan of reorganization §77(b). Rail and non-rail properties may be sold free and clear of liens under §77(o) (subject to the limitation imposed in this Circuit by *In re Penn Central*

Transportation Co., 458 F.2d 1030 (3d Cir. 1973)). Under certain circumstances, funds held subject to the liens of mortgage indentures may be used for working capital or additions and betterments to the plant, *Central R.R. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F.2d 604 (3d Cir. 1970); *In re Third Avenue Transit Co.*, 198 F.2d 703 (2d Cir. 1952). And notwithstanding lack of majority support, an approved plan may be confirmed under the cram-down provision of §77(e), *R.F.C. v. Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495 (1946). Moreover, the expertise of the Interstate Commerce Commission is made an integral part of a §77 reorganization process by the assignment to the Commission of the task of formulating the plan, ascertaining the values of railroad property, and evaluating the public interest aspects of the proposed uses of a §77 debtor's transportation property.

The reorganization process fosters the public interest as well as the private interests of owners and creditors. The economic inefficiency of dismantling a potentially productive enterprise is avoided, and investor confidence is restored. Moreover, §77 is designed to promote the public interest in preservation of a sound rail transportation system. *Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 676 (1935).

B.

The Regional Rail Reorganization Act of 1973 represents the Congressional response to the unfortunate fact that the processes and concepts of §77 outlined above proved inadequate to deal with the current plight of railroads in the Northeast. Section 77 is adequate only when a railroad's revenues are, or can reasonably be predicted to be, in excess of operating expenses.

Historically, railroad reorganizations have been precipitated by the circumstances that fixed charges were unrealistically high in relation to long-term earning capacity. The solution was to scale down and stretch out the debt structure so that fixed charges could be met from net operating revenues without exhausting those revenues.

Penn Central and most of the other bankrupt northeastern carriers do not generate net operating revenues, but incur large operating deficits. They cannot achieve reorganization on an income basis under §77.

As a matter of simple maximization of values, if there is no "going concern" value in the usual sense, there is no justification for continuing a reorganization proceeding,[6]

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[6] The significant advantage of §77 over the equity receivership is the substitution of the Interstate Commerce Commission's valuation procedures for the foreclosure sale of the equity receivership as the mechanism for determining who has an interest in the debtor's estate. *See* generally S.E.C., *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, Part VIII (1940). But clearly, the §77(e) procedures are assumed to result in a valuation in excess of that which would be obtained by the foreclosure sale. As Mr. Justice Douglas observed in *R.F.C. v. Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495, 509 (1946):

> "Liquidation in depression periods meant that large portions of debts, as well as stock interests in the properties, would be irretrievably lost to the holders, while reorganization on a capitalization that estimated what normal income would support meant the salvage of sound values. We see no more constitutional impediment to the elimination of claims against railroad debtors by the Interstate Commerce Commission's determination of values,

(Cont'd)

unless either or both of the following conditions are established: (1) a reasonable prospect that, because of streamlining, consolidations, and other changes in circumstances, earning power and profitability can be restored; or (2) a reasonable prospect that the public need for preserving the debtor's railroad is such that it will be appropriated for public use, and that the values inherent in its assemblage as an operating railroad will be recognized and paid for. *Cf. Port Authority Trans. Hudson Corp. v. Hudson Rapid Tubes*, 20 N.Y. 2d 457, 231 N.E. 734, *cert. denied* 309 U.S. 1002 (1967).

If Penn Central were not a railroad and were being reorganized under Chapter X, presumably a liquidating plan of reorganization would be pursued, 6A Collier ¶10.02, at pp. 421-23, or the proceeding would be converted to a straight bankruptcy proceeding or dismissed under §236 of the Act. But railroad corporations are not eligible for relief under the straight bankruptcy provisions. Section 77(g) does permit dismissal of the case, but the implications of such a dismissal are not clear. Presumably, such a dismissal would be immediately followed by an equity receivership and the relatively cumbersome and unsatisfactory liquidation measures available in such a proceeding.

As discussed in Part II of this Opinion, a plan of reorganization providing for the partial or total liquidation of a §77 debtor's rail assets might well be accomplished under §77. The language of §77(b)(5) provides that:

(Footnote 6 cont'd)

> with judicial review as to the sufficiency of the evidence and compliance with statutory standards, than we do to their elimination by an accepted bid in a depression market."

> "[The plan may provide for] the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than the fair upset price."

The New Haven plan can be characterized as a liquidating type of reorganization plan. However, in its October 1973 report to the Penn Central reorganization court (Document No. 6336), the ICC expressed the view that such a liquidation could not be regarded as a plan of reorganization under §77, apparently on the basis of a perceived difference in the degree of assurance of continued operation of the railroad by someone.

It is against this background, and in light of the accrued and continuing post-reorganization losses summarized in Judge Aldisert's Opinion, that the provisions of the Act are to be considered.

IV. Analysis of the Pertinent Provisions of the Statute

It is desirable at the outset to attempt to characterize the Act in terms of some familiar legal model or category. To the extent that the statute can thus be labeled, *e.g.*, as a reorganization statute or as an eminent domain statute, the constitutional implications emerge with reasonable clarity. Unfortunately, the Act does not fit comfortably into any familiar category.

From the terminology employed in the statute, and much of the legislative history, it would appear that a reorganization-type statute was intended. But on the basis of its total impact, such a characterization is somewhat misleading. Perhaps the best description of the essential character of the statute appears in §207(b):

> "Each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act."

It bears emphasis that the Act does not affect the reorganization process of §77 directly. Upon completion of all of the procedures contemplated by the Act, it will still be necessary for the parties to the Penn Central proceeding to complete the process of adjustment of creditors' claims, and of proposing, processing and consummating a plan of reorganization that is fair and equitable in accordance with the requirements of §77. What the Act does is provide a mechanism for consummating, insofar as the Debtor's rail assets are concerned, what would be in effect a liquidating reorganization plan, if the properties are transferred to Conrail (and perhaps other solvent railroads) pursuant to the Final System Plan. In connection with such a partial liquidation scheme, the §77 role of the Interstate Commerce Commission is largely eliminated, as is participation and voting by creditors. Essentially, the Act provides a buyer for some or all of the Debtor's rail properties, an expedited mechanism for terminating rail services over the balance of the Debtor's properties, and expedited procedures for achieving the transfer and sale.

Thus, the Act can be viewed as a reorganization statute in the sense that it provides for disposal of some or all of the Debtor's rail properties in a manner analogous to dispositions authorized by §77(o) of the Bankruptcy Act during the course of a reorganization and outside a

reorganization plan, or pursuant to §77(b)(5) of the Bankruptcy Act as part of a reorganization plan. The obvious difference, however, is that under §77(o) a sale must be found to be "in the interest of the debtor's estate and of ultimate reorganization" and the price must be adequate, and under §77(b)(5) the sale price must be at least equal to a fair upset price established by the reorganization court. It is noteworthy that, in the *New Haven Inclusion* case, *supra*, the reorganization court viewed the conveyance of the New Haven's properties to Penn Central as having been made pursuant to §77(b)(5). Although the full price was not to be finally ascertained until after the conveyance, a minimum price had been established before the conveyance, and the parties were all willing to leave the final price open for further litigation.

The *New Haven Inclusion* case is particularly instructive in another respect: There, a substantial part of the purchase price was to be paid in the form of Penn Central stock. In order to insure that the New Haven interests would receive the actual value of the assets conveyed, Judge Anderson imposed an underwriting provision which in effect required a guarantee that the stock would regain its previous market value of $87.50 per share at some time during a ten-year period following the conveyance.[7] The Supreme Court expressly approved that feature of the transaction, as of the date of the district court's decision, but since Penn Central had entered reorganization shortly before the Supreme Court decided the case, the Court remanded for further proceedings, stating:

[7] *In re New York, New Haven & Hartford R.R. Co.*, 314 F. Supp. 793, 808 (D. Conn. 1969).

> "The fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. . . ." 399 U.S. at 488-89.

The decision of the Supreme Court can be fairly read to mean that, if shares of stock are to constitute part of the consideration for a sale under §77(b)(5), the issuer must in some manner underwrite the value of the stock.

It is apparent that the approach represented by the Act is quite different from what has heretofore been considered as within the ambit of §77(o) or §77(b)(5). The transfer transaction is initiated by Congress and is to be implemented through USRA and Conrail. The value of Conrail stock is to be determined after the conveyance, and the railroad must accept the risks of fluctuations in market price (assuming that the stock is marketable at all).

At first blush, there is some similarity between the approach of the Act, and the treatment accorded claimants in the §77 proceeding under a plan of reorganization. Pursuant to such a plan of reorganization, secured and unsecured creditors, as well as stockholders, may be required to relinquish their property rights in exchange for securities of inferior character. Such exchanges are, of course, subject to the absolute priority rule and the standards of §77(e) concerning valuation. Claims which cannot be satisfied within the framework of the new capital structure are discharged.

But again, this is only a surface similarity. The Act does not operate at the claimant-debtor level, but involves

the debtor and Conrail. The Conrail securities are to be issued to the debtor, not to its creditors. The valuation of the creditors' security and their treatment under the plan would not be contemporaneous, or, perhaps, even related. While an eventual reorganization plan for the railroad might provide for a direct pass-through of Conrail securities to the creditors whose claims were secured by properties taken by Conrail, that would not be a necessary result. Moreover, the voting rights of Conrail stockholders would be so limited that they would have no voice in management of the enterprise, §301(d), and, apparently, the stock would be ineligible for listing on the major exchanges.[8] Thus, it is clear that the Act does not fit comfortably within any existing procedure or mechanism under the Bankruptcy Act.

Finally, it is of course clear that the approach of the Act does not fit an eminent domain model. It does not

[8] In *R.F.C. v. Denver & Rio Grande Western R.R. Co., supra*, the Supreme Court affirmed the district court's confirmation and cram down of a plan on a group of junior secured creditors. In reviewing the dissenter's contention that the original valuation by the Interstate Commerce Commission was too low and that, in any event, subsequent events demonstrated the valuation was too low, the Court stated that "the unlimited dividends that might be earned and paid on the common stock in 'lush years,'" 328 U.S. at 518, and the large amount of cash on hand were "part of the compensation to senior claimants for their loss of position," 328 U.S. 522. Moreover, the bondholders obtained some control of the corporation by receiving common stock. While the earnings at the time of the challenge to the plan were substantially in excess of that envisioned by the Interstate Commerce Commission, the Court approved the capital structure based on the earning power, in part, on the theory that the loss of the senior claimants' secured position justified receipt of stock which had the possibility of paying substantial dividends.

provide for payment in cash, payment is not assured in advance of the conveyance, and there is a limit upon the amount of the consideration.

There are, however, at least partial resemblances to a condemnation approach. The conveyances are not voluntary, on the part of either the purchaser or the seller. Conrail, although purportedly a private corporation, has no choice in the matter. The only element of choice, insofar as the railroad is concerned, is the limited choice afforded in connection with the §207(b) findings, and these are choices of the courts, not of the railroad or its creditors. From the standpoint of the seller-railroad, there is no assurance that the price will ever actually be realized. If the value of Conrail's stock, plus whatever portion of the $500 million in USRA bonds are included in the consideration mix, is less than the "constitutional minimum" value to which the railroad is entitled, the Special Court can enter a deficiency judgment against Conrail. But it seems rather obvious that if the value of Conrail's stock is inadequate, a judgment against that same equity would add nothing, and would be essentially circuitous.

From the standpoint of Conrail, on the other hand, the fact that the price may be fixed at a level greater than the value produced by capitalizing the projected earnings of the new venture[9] is a significant departure from the normal concept of a private sale. For a private purchaser would not ordinarily be expected to pay more for a business enterprise than its capitalized earnings.

To summarize, the RRRA represents an amalgam of sale, reorganization, and eminent domain concepts. Implementation of the Final System Plan would produce

[9] *See* note 6, *supra*.

transactions akin to sales under §77(o) or §77(b)(5) of the Bankruptcy Act, but without the safeguards of participation by the parties or advance judicial scrutiny; sales in which the price would be paid in a form somewhat like that encountered in a plan of reorganization. The transactions would somewhat resemble a reorganization in which the "cram down" decision is made by Congress, or at least virtually compelled by Congress, in advance of formulation of the plan. And the plain purpose of the entire arrangement would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, without regard to the wishes of the present owners of the properties.

The novelty of the statutory approach does not, of course, establish its unconstitutionality. In dealing with problems of this importance and complexity, it is understandable that Congress should attempt to apply whatever legal concepts might prove useful. But merely because it can be constitutionally permissible under some circumstances to compel creditors in a reorganization plan to be satisfied with stock in the new enterprise, it does not follow that that result is always permissible. Presumably, the Fifth Amendment is equally applicable to bankrupts and non-bankrupts. Thus, if the compulsory character and public purpose of the Act compel the conclusion that the Act constitutes an exercise of the eminent domain power, albeit a slightly indirect one, the use of stock as the compensation medium is extremely suspect. *See,* Nicholas, *Eminent Domain* ¶8.2 (3d rev. ed. 1970) and cases cited therein. Similarly, at least until now, a decision that a stock distribution was fair and equitable has always required *contemporaneous* comparisons between the value of the creditors' and stockholders' claims and the value of the stock, a weighing of entrepreneurial risks

against the prospects for growth. And merely because it is constitutionally permissible for a reorganization court to authorize sales of assets free and clear of liens, it does not follow that such sales may be approved without knowledge of the purchase price, and without a simultaneous transfer of existing liens to proceeds having value equivalent to the assets conveyed. And, of course, the magnitude of the public interest in continued rail service cannot justify treating these rail properties as if they were already public property.

It is apparent that the determination by the Special Court as to what constitutes the "constitutional minimum" price for the transferred properties is crucial to the implementation of the statute. That issue, as such, is not before this Court and I intimate no view on the merits. But it is important to note that, no matter how that issue may ultimately be resolved by the Special Court, the present, immediate, constitutional obstacle would remain. There is no assurance that the price fixed by the Special Court can be paid, under the statutory scheme.

Under any view of the Act, there is at least a distinct possibility that application of the deficiency judgment mechanism will be required; and, as set forth above, that is an obviously inadequate remedy. It must be assumed that USRA will strive diligently to comply with the Congressional directive to design both "a financially self-sustaining rail service system" and a "rail service system adequate to meet the rail transportation needs and service requirements of the region." At present, no one knows whether these somewhat inconsistent goals can be achieved. Congress itself has recognized the uncertainty, by retaining the right to review the plan before it becomes effective. And of course, even if the Final Plan is designed to show

profitability on the basis of *pro forma* projections, there can be no assurance that actual results will live up to the forecasts.

The point is, not that these uncertainties can or should be eliminated, but that all risks – of the possibility of designing a profitable system, of ultimate profitability, and of interim losses while the hypotheses are explored – are imposed upon the debtors and their creditors, who are to be irretrievably committed to the project in advance, no matter how it works out.

As discussed in Part I of this Opinion, I agree with the majority that we need not reach all of the constitutional implications of the transfer provisions of the RRRA. Specifically, we need not now determine whether or not those transfer provisions amount to an exercise of the power of eminent domain. But it is impossible to avoid the conclusion that, before the burden of further interim erosion can constitutionally be imposed upon the railroad and its creditors, there must be greater assurance of a constitutionally acceptable end result than is provided by this statute.

V. The Tucker Act Remedy

For the reasons so well stated in the majority Opinion, I agree that Congress did not intend to provide for any compensation to the railroads or their creditors for interim erosion other than that specified in the Act. Whether this would necessarily preclude a later resort to the Court of Claims on a constitutional theory I deem it unnecessary to decide. I note, however, that the argument of the government defendants in support of such a potential remedy seems to amount to an assertion that governmental immunity is itself constitutionally suspect.

For present purposes, it suffices to state that the availability of a Tucker Act remedy is not now sufficiently assured to justify denial of relief in the present litigation. Moreover, the adequacy of any such putative remedy, if it exists, seems highly questionable. I find it difficult to characterize as due process of law the notion that further interim erosion can be justified because, if the lengthy and complex procedures of the Act do not produce a constitutionally permissible result, the parties may then start over again in the Court of Claims. The rights of the secured creditors of the New Haven, for example, have already been held in suspension for more than ten years.

I concur in the result reached by the majority. I am authorized to state that Judge Bechtle joins in Part II of the foregoing Opinion.

/s/ John P. Fullam

ORDER

AND NOW, this 25th day of June, 1974, for the reasons set forth in the foregoing opinions, it is ORDERED:

1. That the defendant, United States Railway Association, is enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c) of the Regional Rail Reorganization Act of 1973.

2. That the defendants are enjoined from taking any action to enforce the provisions of Section 304(f) of the Regional Rail Reorganization Act of 1973, with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution.

3. That all parties are enjoined from enforcing, or taking any action to implement, so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as purports to require dismissal of pending proceedings for reorganization under Section 77 of the Bankruptcy Act.

4. That a declaratory judgment be entered, declaring:

a. That Section 303 of the Regional Rail Reorganization Act of 1973 is null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute.

b. That Section 304(f) of the Regional Rail Reorganization Act of 1973 is null and void as violative of the Fifth Amendment of the United States Constitution, to the

extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad.

c. That so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as requires reorganization courts to dismiss pending proceedings under Section 77 of the Bankruptcy Act under the circumstances set forth in said Section 207(b) is null and void, as violative of Article I, Section 8, Clause 4 of the Constitution of the United States.

5. That the respective motions of the plaintiffs for partial summary judgment are granted in part, as set forth above, and in all other respects are denied.

6. That the defendants' motions for summary judgment are denied.

/s/ Ruggero J. Aldisert
Ruggero J. Aldisert

/s/ John P. Fullam
John P. Fullam

/s/ Louis C. Bechtle, J.
Louis C. Bechtle, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[caption omitted in printing]

MEMORANDUM AND ORDER NO. 1543, and FINDINGS PURSUANT TO THE FIRST SENTENCE OF §207(b) of the Regional Rail Reorganization Act of 1973

FULLAM, J. May 2, 1974

Section 207(b) of the Regional Rail Reorganization Act of 1973 (hereinafter the "Act"), provides:

> "Within 120 days after the date of enactment of this Act, each United States District Court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act . . . ."

The Debtor is a "railroad in reorganization" as defined in the Act. The statute became effective January 2, 1974, which means that the decision as to reorganizability is to be made not later than May 2, 1974.

By Order No. 1426, this Court directed that a hearing be held on March 25, 1974, in relation to the decision required by the quoted language of the statute, and invited all interested parties, at stated times in advance of the hearing, to specify and brief the legal and factual issues they deemed relevant to the required determination.

In response to this invitation, a wide range of questions have been briefed and presented, but in view of the factual record developed at the hearing, not all of these issues need now be discussed.

I. Jurisdictional and Other Preliminary Issues

It is necessary to note at the outset that the constitutionality of the Act is being challenged on a variety of grounds in other litigation now pending in this District and elsewhere.[1] Many of the same constitutional issues have been raised in the present proceeding. For the most part, they will not now be considered. Apart from the question of whether this Court should attempt to avoid deciding the constitutional issues, in deference to the three-judge proceedings, it would seem that these issues can and should be deferred for consideration in connection with the findings contemplated by the second clause of §207 (b) (the so-called "180-day findings").

The only constitutional issues which must be faced now are those expressing a challenge to the jurisdiction of this Court to make the findings required by §207(b).

The findings contemplated by the first sentence of §207 (b), the so-called "120-day" findings, embrace two areas

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[1] The two cases originally filed in this District are *Connecticut General Insurance Corp., et al. v. United States Railway Association, et al.*, Civil Action No. 74-189, and *Manufacturers Hanover Trust Co. v. United States Railway Association, et al.*, Civil Action No. 74-332. In both cases, a three-judge court (of which the writer is one member) has been convened, pursuant to 28 U.S.C. §2284. Documents filed of record in those cases suggest that similar cases pending in other districts are being transferred to this District pursuant to 28 U.S.C. §1404.

of inquiry: (1) whether the Debtor "is reorganizable on an income basis within a reasonable time under §77 . . ." and (2) "[whether] the public interest would be better served by continuing the present proceedings than by reorganization under this Act . . . ." The New Haven Trustee contends that this Court lacks power to make findings on either subject because there is no "case or controversy" before the Court; and further argues that making findings with regard to "the public interest" is not a judicial function and cannot be delegated to a court, at least in the absence of adequately defined standards.

A. "Case or Controversy"

I have concluded that a finding on the issue of reorganizability may properly be made by an Article III court. The reorganization proceeding itself is the "case or controversy" which justifies judicial action. While there might perhaps be some question as to the validity of legislative intrusion into specific pending litigation by fixing deadlines for decision of particular issues (a question which has not been raised in the present proceeding, and as to which I intimate no view), it is entirely clear that a court may properly comply with such deadlines; its preexisting jurisdiction would not be impaired.

It is true that the Act does not prescribe procedural machinery for making the required findings in an adversary setting: there is no petitioner or respondent; indeed, the Act does not even mandate a hearing. But there is no requirement that the norms of procedural due process must be disregarded, and they have not been. All parties have been afforded ample opportunity to be heard.

It is also true that the statute provides little or no guidance on the question of the proper allocation of the bur-

den of proof; but that shortcoming is not, in my view, jurisdictional.

In short, there appears to be no valid reason for reaching any conclusion other than the obvious one, namely, that a reorganization court does have jurisdiction to make findings concerning reorganizability of the Debtor.

B. Public Interest

The principal thrust of the New Haven Trustee's jurisdictional argument is that a determination as to whether the public interest would be better served by continuing the §77 proceeding or by proceeding pursuant to the 1973 Act is essentially legislative in character, and cannot be delegated to an Article III court. The government and other parties counter with the argument that the Act itself adequately discloses what Congress intended to define as the public interest, and that all that is required is performance of the normal judicial function of fact-finding.

Unless there is a finding that the Debtor is reorganizable under §77, there is no necessity for making a public interest comparison under §207(b). Since I have reached the conclusion that the Debtor is not reorganizable, there is no present necessity for resolving the second phase of the jurisdictional argument.

II. Definition of "Reorganizable on an Income Basis Within a Reasonable Time under §77 of the Bankruptcy Act"

The parties are not in complete agreement as to whether the standards for determining reorganizability under the Act are different from, or identical to, the standards of

§77. More importantly, there is lack of agreement as to what constitutes a valid plan of reorganization under §77.

For example, the *New Haven Inclusion Cases*, 399 U.S. 392 (1970) recognized as valid a plan of reorganization in which the Debtor would first dispose of its rail operations and then reorganize as a holding company. But when the Penn Central Trustees filed a somewhat similar plan, the ICC purported to hold that it would not constitute a plan of reorganization under § 77. While this ruling does not, of course, represent the final word on the subject, it serves to point up the potential for conflicting views.

I find it unnecessary to resolve this doctrinal dispute at the present time. For it is at least clear that in adopting the 1973 Act, Congress was attempting to deal only with the rail assets of railroads in reorganization, and that, for purposes of §207(b) only a reorganization of those rail assets, pursuant to a plan involving continuation of rail service by the Debtor, would pass muster.

Moreover, I am persuaded that reorganizability must be determined on the assumption that the existing regulatory and operational setting will continue. From the very inception of these proceedings, it has been reasonably clear that, if certain conditions could be altered, the Debtor could be made viable. The needed changes – elimination of plant redundancy, reductions in crew consists, full reimbursement for passenger service, improvement in rates and divisions, and, more recently, substantial governmental financial assistance – are not within the control of the Trustees or this Court, and have not been realized.

The issue, then, is whether there is now any reasonable prospect that continuation of the Debtor's rail

operations under existing constraints will produce enough net income, soon enough, to support adequately a realistic re-capitalization of the enterprise. Applying the familiar figure of speech, we are concerned with the existence and relative intensity of the light at the end of the tunnel, and also with the length of the tunnel and the further burdens involved in traversing it.

III. Findings of Fact

1. During the period from the filing of the Debtor's reorganization petition on June 21, 1970, to December 31, 1973, the Debtor's operations have produced losses in ordinary income, calculated in accordance with ICC regulations (49 CFR Part 1201, 501-51) totalling $851.1 million.

2. The Debtor has been able to continue operations during this period only by deferring payments of virtually all real estate taxes, rentals of leased lines, and interest (including mortgage and collateral trust bonds) other than equipment obligations.

3. Non-recurring income aggregating $155.3 million from trustees certificates, sales of real property and equipment, sales of securities, and drawdowns from escrowed funds, have been utilized to sustain operations.

4. The charts below show the ordinary losses, deferrals, and applications of non-recurring income on an annual basis and the detail relating to non-recurring income.

Summary of Financial Results
($ in millions)

	Ordinary Income (Loss)	Deferred Taxes Leased Line Rents and Interest Oblig.*	Non-Recurring Sources of Cash	
June 21 to Dec. 31, 1970	$(179.7)	$142.8		
Year 1971	(284.5)	163.9	$96.6	
Year 1972	(197.9)	156.1	25.0	
Year 1973	(189.0)	143.1	33.7	
Total June 21, 1970 to December 31, 1973	$(851.1)	$605.9	$155.3	**

*Interest on all debt obligation, secured and unsecured, is included in these figures.

**Does not include approximately $10.7 covered in Order No. 1480 dated March 1, 1974, regarding D.O.T. and certain equipment obligations.

Detail of Non-Recurring Sources of Cash

Sources	1971	1972	1973
Trustees Certificates Drawdown	$75.0	$25.0	
Tenants Tax Escrow Account	3.1		
Proceeds from New Haven Property Sale	9.1		
Sale of Freight Cars to P&LE	7.3		
Mortgage Trustees Drawdown-Selkirk Improvement	2.1		
M.B.T.A. Settlement			$ 9.1
Proceeds from Madison Square Garden			2.4
Proceeds from Sale of Contingent Compensation Fund			6.5
"Agnes" Flood Loan			15.7
Total	$96.6	$25.0	$33.7

5. The aggregate annual expenditures, including all road depreciation accounts, for maintenance of way and structures by the New Haven, New York Central, and Pennsylvania Railroads from 1957 to 1968 and the Debtor's expenditures since the merger, are reflected below:

1957	$224.75	1966	$179.73
1958	176.47	1967	178.54
1959	176.55	1968	190.66
1960	176.43	1969	190.32
1961	163.14	1970	223.82
1962	171.47	1971	256.46
1963	168.34	1972	244.51
1964	171.21	1973	255.9
1965	172.47		

6. The cost of labor and material utilized in maintenance of way and structures has risen 113% from 1957 to 1973.

7. Expenditures for maintenance of way and structures from 1958 until the merger, and to a lesser extent since the merger, were inadequate to maintain the plant at the level necessary to accommodate traffic.

8. The initial impact of deferral of maintenance of way expenditures was on branch, side, and yard trackage. By the mid-60's, the deferral of maintenance began to have an impact on main line trackage, and since that time the deterioration of portions of the main line has accelerated. Foregoing preventive maintenance has created a situation in which significant refurbishing and replacement of materials is now necessary.

9. In 1970, slow orders had been imposed on 2,100 track miles. By 1974, slow orders had been imposed on 8,475 track miles. 6,900 track miles within the system are not in adequate condition to meet the minimum standard imposed by the Federal Rail Administration for operational train speeds of 10 miles per hour. 49 CFR 213 *et seq.*

10. Assuming normalized maintenance of way expenditures of at least $225 to $250 million per annum, an addi-

tional $665 million in present dollars must be expended in an eight-year period to remedy past deferrals.[2]

11. Poor condition of the roadway increases train time, and thereby decreases the service capacity and revenue of the system.

12. In order to provide an estimate of the future financial results of the Debtor's operations, the Trustees' traffic consultants, Temple, Barker & Sloan, developed a forecast of traffic and revenue for 1974 through 1978 (the forecast period).

13. The main assumptions underlying the forecast are as follows:

a. Using 1958 as the base year, the national economy will have an average real rate of growth of 4% per annum during the forecast period.

b. Rail traffic growth in the eastern district will be less than the national rail traffic growth rate. The difference between the eastern district and the national growth rate will be less than in previous years.

c. The Debtor's rail service will be adequate during the forecast period to meet the reasonable expectations of its shippers.

d. The "energy crisis" will improve the competitive position of railroads versus other transportation modes, and improve the Debtor's total tonnage carried and commodity mix.

[2] This figure is derived from Mr. Jackman's affidavit (Document No. 7243) in which he estimated an 11,000-route mile system would require $451 million ($41,000 per route mile) and the 15,000-route mile system would require $567 million ($37,466 per route mile) to cure past deferrals. A per-route mile cost of $35,000 is applied to an assumed 19,000-route mile system to generate the estimate of $665 million to cure deferred maintenance throughout the system.

e. Governmental environmental regulations will be altered to permit utilities and industry to increase their use of coal.

f. Coal traffic will increase 31% from 1973 to 1978, with coal traffic in 1978 comprising 31% of the Debtor's traffic as compared to 28% of the Debtor's traffic in 1973.

g. Higher fuel costs after 1974 will be covered by immediate rate surcharges or increases; or, stated another way, the 1975-78 figures show no incremental cost for fuel and no additional revenue from rate increases to cover that cost.

h. Rate increases adequate to cover increased unit costs (increased costs less saving from higher productivity) will be effective on July 1 of the year succeeding the cost increases.

14. The 1973 estimated actual tonnage for the Debtor was 276.9 million tons. A tonnage increase of 3.68% per year over the 1973 estimated actual tonnage is predicted as follows:

(millions of tons)

1974	-	282.1
1975	-	293.8
1976	-	305.3
1977	-	316.0
1978	-	327.9

15. In accord with the method set out below, the traffic forecast was utilized to generate a net revenue forecast in current dollars.

a. Unit revenues derived from a model based on 1972 data with certain adjustments to reflect 1973 data were

applied to the projected tonnage in each commodity category to generate estimated gross revenue in 1972 dollars.

b. Gross revenue was adjusted to a net revenue figure by application of a .047 factor to reflect revenues received for services rendered by others.

c. Net revenues in 1972 dollars were then converted into current dollars for the forecast period by determining the increase cost due to inflation as offset by productivity increases. Revenue was then adjusted in accord with the rate increases assumptions indicated in Finding 13(h).

d. No reduction in tonnage was made to reflect possible shipper reaction to rate increases.

16. Revenue in current dollars is forecasted to be:

(in millions)

1974	-	1,879.2
1975	-	2,069.4
1976	-	2,258.2
1977	-	2,435.5
1978	-	2,637.3

17. Fifty-five percent of the increased revenue is attributable to rate increases and 45% to increased traffic, changes in commodity mix, and changes in unit revenue.

18. Below is the forecasted income statement for the Debtor premised on the traffic and revenue forecast with certain assumptions for cost increases.

(dollars in millions)

	1974	1975	1976	1977	1978
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,258.2	$2,435.5	$2,637.3
All other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,309.7	2,491.6	2,651.6	2,815.7	3,001.7
Net Rwy. Oper. Inc.	(141.2)	(118.4)	(71.4)	(40.2)	(4.4)
Other Income	62.2	74.2	82.0	88.5	90.4
Misc. Deductions	21.2	20.2	20.2	20.2	20.2
Inc. Avail for Fx. Chgs	(100.2)	(64.4)	(9.6)	28.1	65.8
Fixed Charges	137.5	131.9	126.4	124.1	122.0
Ordinary Income	$ (237.7)	$ (196.3)	$ (136.0)	$ (96.0)	$ (56.2)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons handled (Mil.)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (%)	82.99	81.16	79.49	78.51	77.45

19. The ordinary income loss for 1976, '77 and '78 as shown in Finding 18 is overstated because the revenue projections therein utilized did not reflect rate increases to cover increased fuel cost in 1977-78, whereas the operating cost projections do contain increased fuel costs. The substantial increment in the "Other Income" account shown in Finding 18 is attributable to yearly increases in the proceeds of property sales ($6.7 million in 1974 compared with $30 million in 1978).

20. The chart below shows the projected cash position resulting from operations consistent with the income statement shown in Finding 18.

Source and Application of Funds

(dollars in millions)

Source	1974	1975	1976	1977	1978
Ordinary income (Loss)	$(237.7)	$(196.3)	$(136.0)	$ (96.0)	$(56.2)
Adjustments to Earnings:					
Taxes-Accrued	58.5	60.5	62.5	64.4	66.8
-Paid	(.4)	(.4)	(.4)	(.4)	(.4)
Interest Accrued	108.3	102.8	97.4	95.1	93.0
-Paid	(23.0)	(23.9)	(18.4)	(16.1)	(14.1)
L.L.Rts.-Accrued	29.0	28.9	28.9	28.9	28.9
-Paid	(1.0)	(1.0)	(1.0)	(1.0)	(1.0)
Depreciation	85.1	83.3	81.3	79.3	77.4
Other	(12.)	(20.0)	(26.1)	(30.7)	(30.7)
Total Adjustments	244.5	230.2	224.2	219.5	219.9
Cash from Operations	6.8	33.9	88.2	123.5	163.7
Other Sources:					
Proceeds from Sale of Salvage	15.1	16.2	17.3	18.5	19.8
Total Sources	21.9	50.1	105.5	142.0	183.5
Application					
Capital Program – Equip.	5.0	11.7	12.4	13.2	14.0
– Road	20.0	30.0	31.9	33.8	35.9
Debt Retirement	39.1	42.3	87.4	35.0	33.6
Amtrak	6.0	–	–	–	–
Total Application	70.1	84.0	131.7	82.0	83.5
Net Incr. (Decr.) in Cash	(48.2)	(33.9)	(26.2)	60.0	100.0
Beginning Cash	40.2	(8.0)	(41.9)	(68.1)	(8.1)
Ending Cash	(8.0)	(41.9)	(68.1)	(8.1)	91.9
Emp. Withheld Taxes Incl. Above	9.0	9.5	10.0	10.5	11.0
Ending Cash Avail for Oper.	$ (17.0)	$(51.4)	$ (78.1)	$ (18.6)	$ 80.9

21. The cash forecast for 1974 is as follows:

(dollars in millions)

	Month Ending Cash Balance Available for Operations[3]
March 1974	$(8.8)
April	(4.7)
May	(2.0)
June	4.9
July	(5.4)
August	(28.4)
September	(19.4)
October	(22.8)
November	(25.8)
December	(17.0)

NOTE: 1. Assumes SEPTA payments in April, August and December of $4 million each.

2. Assumes increase AMTRAK reimbursement of $1.3 million per month commencing May 1974.

3. Cash balances reflect approximately $10.7 million in equipment obligations assumed by the D.O.T.

4. Does not include effect of recent F.R.A. order regarding maintenance standards.

22. The revenue forecast and projections derived therefrom are overstated because of the assumption that the Debtor will be able to provide adequate service to its shippers. Findings 8-13 indicate that the physical condition of the system is not such that the service level will meet the reasonable expectations of shippers. It is estimated that the inability to provide service levels satisfactory to shippers will cause a shortfall in

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[3] By affidavit dated April 26, 1974 (Document No. 7446), the cash balances through August were revised as follows: April - $(17.6); May - $(14.2); June - $(5.6); July - $(15.9); and August - $(38.9).

the revenue forecast of 2 to 3% per annum or $25 to $50 million per year.

23. During the 1974-78 period, $310.7 million in local taxes, $137.1 million in bond interest, and $140 million in leased line rents will accrue, but not be paid.

24. In order to depict the financial results of the Debtor's rail operations only, the income statement shown in Finding 18 was adjusted as follows:

a. Non-rail income, including accruals of tax allocation payments due from related companies, is extracted from the statement.

b. Due to the lack of definitive information, an arbitrary allocation of 50% of the leased line rents and interest obligations (components of fixed charges) have been extracted from the statement.

c. Tax accruals have been adjusted according to a preliminary analysis developed by the Trustees' staff of the tax consequences of severance of rail and non-rail operations.

d. The rail operation is presumed to carry the full cost of overhead.

25. Set out below is the forecasted income statement based on the procedure set out in Finding 24 for the Debtor's rail operations only.

	1974	1975	1976	1977	1978
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,258.2	$2,435.5	$2,637.3
All Other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,314.3	2,496.1	2.656.1	2,820.1	3,006.0
Net Rwy. Oper. Inc.	(145.8)	(122.9)	(75.9)	(44.6)	(8.7)
Other Income	5.6	5.6	5.6	5.6	5.6
Misc. Deductions	13.0	10.9	10.9	10.9	10.9
Inc. Avail for Fx. Chgs.	(153.2)	(128.2)	(81.2)	(49.9)	(14.0)
Fixed Charges	83.5	78.2	72.7	70.4	68.3
Ordinary Income	$ (236.7)	$ (206.4)	$ (153.9)	$ (120.3)	$ (82.3)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons Handled (Millions)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (Percent)	82.99	81.16	79.49	78.51	77.45

26. The chart below shows the projected cash position resulting from rail only operations consistent with the income statement shown in Finding 18.

Source and Application of Funds
(dollars in millions)

SOURCE	1974	1975	1976	1977	1978
Ordinary Income (Loss)	$ (236.7)	$ (206.4)	$ (153.9)	$(120.3)	$ (82.3)
Adjustments to Earnings:					
Taxes-Accrued	51.7	53.6	55.6	57.4	59.7
-Paid	(.4)	(.4)	(.4)	(.4)	(.4)
Interest-Accrued	68.9	63.6	58.2	55.9	53.8
-Paid	(23.0)	(23.9)	(18.4)	(16.1)	(14.1)
L.L.Rts.-Accrued	14.5	14.5	14.5	14.5	14.5
-Paid	(1.0)	(1.0)	(1.0)	(1.0)	(1.0)
Depreciation	83.7	81.9	79.9	77.9	76.0
Other	(1.2)	–	–	–	–
Total Adjustments	193.2	188.3	188.4	188.2	188.5
Cash from Operations	(43.5)	(18.1)	34.5	67.9	106.2
Other Sources:					
Proceeds from Sale of Salvage	15.1	16.2	17.3	18.5	19.8
Total Sources	(28.4)	(1.9)	51.8	86.4	126.0

APPLICATION					
Capital Program-Equip.	5.0	11.7	12.4	13.2	14.0
-Road	20.0	30.0	31.9	33.8	35.9
Debt Retirement	39.1	42.3	87.4	35.0	33.6
Amtrak	6.0	–	–	–	–
Total Application	70.1	84.0	131.7	82.0	83.5
Net Incr. (Decr.) in Cash	(98.5)	(85.9)	(79.9)	4.4	42.5
Beginning Cash	40.2	(58.3)	(144.2)	(224.1)	(219.7)
Ending Cash Emp.	(58.3)	(144.2)	(224.1)	(219.7)	(177.2)
Emp. Withheld Taxes Incl. Above	9.0	9.5	10.0	10.5	11.0
Ending Cash Avail. for Oper.	$ (67.3)	$ (153.7)	$ (234.1)	$ (230.2)	$ (188.2)

27. The forecast shown in Findings 18, 25 and 26 do not reflect the costs of eliminating deferred maintenance. See Finding 10.

28. For over two years the Trustees have been analyzing the effect of reducing the system from its present 19,000-plus route miles to either 15,000 or 11,000 route miles.

29. The Trustees' engineering consultants, Wyer, Dick & Company, prepared extensive studies of traffic movements and costs in 1972 to develop a computer model to assist in ascertaining the traffic that would be retained if the system were reduced to a 15,000 or 11,000-route mile operation. The forecasted results of operating the 15,000-mile or 11,000-mile core are derived from the following premises:

a. The productivity of labor, except train and engine crews, will increase at a compound annual rate of 3% for the 15,000-mile core and 5% for the 11,000-mile core.

b. The respective core systems were implemented on January 1, 1974.

c. Fifty percent of the employees made excess by the reduction of the system would elect to take lump sum severance, and the remaining job slots would be eliminated by attrition.

d. The core railroad would be exclusively freight.

30. The chart below compares the projected tonnage, freight revenue, and net railway operating income for the present system, the 15,000-mile and 11,000-mile cores.

	Tonnage			Net Revenue		
Year	Full System	15,000 Mile	11,000 Mile	Full System	15,000 Mile	11,000 Mile
	(millions of tons)			(millions of dollars-current)		
1974	282.1	271.5	236.0	$1,879.2	$1,813.5	$1,591.7
1975	293.8	283.2	245.9	2,069.4	2,000.9	1,755.1
1976	305.3	294.0	255.6	2,258.2	2,182.3	1,919.3
1977	316.0	304.3	265.1	2,435.5	2,353.7	2,074.1
1978	327.9	316.7	275.2	2,637.3	2,558.9	2,247.2

Net Railway Operating Income

Year	Full System	15,000 Mile[4]	11,000 Mile[4]
1974	(141.2)	(85.8)	(117.1)
1975	(118.4)	(23.5)	44.4
1976	(71.4)	39.8	104.9
1977	(40.2)	72.8	156.4
1978	(4.4)	102.8	171.

[4] These figures were derived by subtracting from the projected income statements (Sharfman affidavit-Document No. 7242) all costs of catch-up maintenance of way and equipment. By doing this the N.R.O.I. projection for the full system and the 15,000 and 11,000-mile systems are comparable. However, all the projections are overstated because the revenue forecast assumed the Debtor's ability to render service equal to reasonable expectations of shippers. The

(Cont'd)

IV. Conclusion

As the foregoing detailed findings disclose, there is no prospect that, in the absence of fundamental changes which the Trustees are precluded from bringing about, the Debtor can be reorganized as an operating railroad. Even if the optimal configuration could be achieved, it appears unlikely that the Trustees could obtain the resources to sustain operations in the interim, or that the final result would make it possible to provide for interim administration expenses and support a recapitalization on a fair and equitable basis.

I therefore conclude, in accordance with the views expressed by every participant in the hearings, that the Debtor is not reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act, within the meaning of §207(b) of the Regional Rail Reorganization Act of 1973.

(Footnote 4 cont'd)

condition of the plant, absent vast investment, is not such that reasonable service levels can be sustained. An alternate approach would have been to include the costs of catch-up maintenance in the full system figures. This would have increased the losses substantially. However, there was no basis in the record for accurately computing the yearly cost of a comparable catch-up program for the full system. *See* Finding 10.

ORDER NO. 1543

AND NOW, to wit, this 2nd Day of May, 1974, it is ORDERED, and this Court finds and concludes, that the Debtor, Penn Central Transportation Company, is not reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205), within the meaning of §207(b) of the Regional Rail Reorganization Act of 1973.

/s/ John P. Fullam
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MEMORANDUM

Re: Proceedings Pursuant to §207(b) of the Regional Rail Reorganization Act of 1973

FULLAM, J. May 2, 1974

Section 207(b) of the Regional Rail Reorganization Act of 1973 (hereinafter "the Act") directs that certain findings be made in each pending railroad reorganization proceeding in the Midwest and Northeast. Application of the Act to the proceedings of the Secondary Debtors poses many legal and factual problems. In large measure, these problems are common to all of the Secondary Debtors, and can conveniently be considered together.

I. Procedural Background

For almost a century it has been a frequent practice of railroad companies seeking to expand into other territories to achieve this goal by means of long term leases of existing rail lines.[1] Use of the operating property can thereby be acquired without the problems and complexities of full-blown corporate consolidations. Generally, rental of the leased line includes servicing the lessor's debt, payments in an amount equal to taxes and the lessor's corporate expenses, and a fixed or contingent annual rental available

[1] An exhaustive treatment of the railroad lease is found in II Dewing, *The Financial Policy of Corporations*, ch. 31 (5th ed. 1953).

for distribution to the holders of the lessor's equity securities. Today, about half of the Penn Central's operating system is owned by Penn Central, and the remainder is leased to Penn Central by numerous lessor companies. Penn Central's predecessors successfully followed the industry-wide practice of acquiring substantial stock holdings in important leased lines. Although many of Penn Central's leased line lessors own important property, only 15 lessor companies are owned or controlled by Penn Central. However, these 15 companies own 9,304 route miles of the Debtor's system.

Railroad leases are, of course, executory contracts, and subject to disaffirmance by a §77 trustee; and even in the event the lease is affirmed by a §77 trustee, the lease may be rejected in the reorganization plan. §77(b). Moreover, if a lease is disaffirmed, operations after the initiation of the §77 proceeding are deemed to have been for the account of the lessor, and as a result the lessor may be obligated to make up losses sustained by the lessee in operating the leased line.[2] In the Penn Central case, pending decisions by the Trustees to affirm or disaffirm leases, rental payments have been deferred.

Deferral of rental payments to lessors exposed the lessors to the possibility of defaulting on their own obligations, thereby triggering action by the lessor's creditors to enforce their rights against the lessors and their property. On the other hand, many of the parties felt that so long as Penn Central continued to operate the leased properties,

[2] The treatment of railroad leases in §77 proceedings is discussed in *In Re Penn Central Transportation Company (Sale of Park Avenue Properties)*, 354 F.Supp. 717 (E.D. Pa. 1972), aff'd in part, 484 F.2d 323, 334 (3d Cir. 1973).

and so long as the leases were not disaffirmed, this Court's jurisdiction to protect Penn Central's leasehold interest provided shelter for the lessors as well. In order to maintain a degree of control over the status of leased lines, at an early stage of the Penn Central reorganization virtually all of the interested parties agreed to the entry of a "status quo" order in the Penn Central proceeding, to the effect that no one could take action to enforce any claims against the lessors, except upon 14 days' advance notice to all other parties (Order No. 170). Thus, an opportunity was provided the parties to apply to this Court for specific protection, if appropriate.

Order No. 1, and additional orders thereafter, stated and extended the time within which the Trustees were obligated to make decisions concerning affirmance of executory contracts. The Trustees submitted reports (Document Nos. 2466, 2637, 3029, 4428) explaining the significant difficulties they were encountering in attempting to determine whether the estate would be benefitted by affirmance of each of the leased line leases. Eventually the time within which to act on leased lines was extended until further order of this Court (Order No. 948). To date, only the New York & Harlem Railroad Company lease, which includes the land underlying portions of the Penn Central's substantial real estate holdings in the Park Avenue area of New York City, has been affirmed. In all other cases (except certain leases of Canadian Lines, not part of this reorganization proceeding), Penn Central has paid no rent under the leases since bankruptcy, and the leases have neither been affirmed nor rejected by the Penn Central Trustees.

From time to time, as the Penn Central proceedings continued, sales of excess properties owned by leased lines were effectuated. In some instances, it became necessary to

resort to fairly cumbersome proceedings in order to be certain that the purchaser would acquire clear title, with assurance that liens against the lessors' reversionary rights had been discharged from the property. Yet, on the whole, the situation of the leased lines remained relatively stable compared to other aspects of the Penn Central proceeding.

In 1973, it became apparent that, in the absence of Congressional action, Penn Central might be unable to continue operations. The Penn Central Trustees filed a proposed plan of reorganization which contemplated termination of rail operations, disposition of its rail property within a short time, and reorganizing around the proceeds plus the non-rail assets. On July 12 and 14, 1973, the 15 lessor companies which are owned or controlled by Penn Central filed separate reorganization petitions pursuant to §77(a) of the Bankruptcy Act, seeking reorganization as part of or in connection with the plan of reorganization of the Penn Central. These 15 leased lines are hereinafter referred to as the "Secondary Debtors." Initially, in an effort to minimize the overall costs of the reorganization proceedings, I withheld appointment of trustees for the Secondary Debtors, and permitted the Secondary Debtors to function as debtors in possession. The passage of the 1973 Act and other intervening developments made it appear likely that the future course of the reorganization proceedings might well be such that the interests of the Secondary Debtors could best be protected by appointment of trustees. Accordingly, on March 11, 1974, trustees were appointed for all but one of the Secondary Debtors. In some instances, the same individual was designated for several Secondary Debtors, having similar, or at least non-conflicting, interests. So that the designated trustees could begin operations immediately, they were also designated temporary receivers, pending final action by the Interstate Commerce Commission upon their

ratification. At present writing, the Commission has ratified five of the Trustees, but has announced no decision as to the other two.

One of the Secondary Debtors, Connecting Railroad, continues in reorganization as a debtor in possession, without a trustee, pursuant to a stipulation worked out between all of the parties interested in that lessor.

II. Necessity for Separate §207(b) Findings for Each Secondary Debtor

The Act requires a finding as to reorganizability with regard to every "railroad in reorganization" (§207(b)). That term is defined as "a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization [under §207(b)]." Section 102(12). And the term "railroad" is defined as "a common carrier by railroad as defined in §1(3) of part I of the Interstate Commerce Act (49 U.S.C. §1(3))" §102(11).

Initially, the government contended that §207(b) findings would be inappropriate in the cases of the Secondary Debtors, because they were not "railroads in reorganization" within the meaning of the statute, since they were not "railroads" in the sense of being operating carriers. The government has now expressly abandoned that contention, perhaps because, if the contention were accepted, the possibility of acquisition of the lessors' interests in rail property through mandatory conveyance would be jeopardized. I am persuaded that the government's original contention was without merit in any event. Leased lines have always been regarded as "railroads" for purposes of the Interstate Commerce Act and §77(a) of the Bankruptcy

Act. *See, e.g., Warren v. Palmer*, 310 U.S. 137 (1970); *Freeman v. Mulcahy*, 250 F.2d 463, 466 (1st Cir. 1957). This Court has previously rejected similar arguments based upon unduly narrow readings of the Interstate Commerce Act. *See* Memorandum and Order No. 11, *United New Jersey Railroad & Canal Company* proceedings.

The principal contention of the government now appears to be that all of the Secondary Debtors must be automatically found non-reorganizable if the Penn Central itself is found not to be reorganizable. The basis for this argument is the assertion that, having petitioned under §77(a) of the Bankruptcy Act for reorganization "as part of, or in connection with" a plan of reorganization of Penn Central, the Secondary Debtors cannot be permitted to reorganize as an independent operating company or by sale of lease of the Secondary Debtor's property to another carrier.

For purposes of discussion, I am prepared to assume that the government is correct in its assertion that a secondary debtor, by petitioning under §77(a), casts its lot with that of the principal debtor, at least to some extent. In my view, this means that both companies are committed to working towards achieving plans of reorganization which are compatible with each other, and to do so according to a somewhat similar timetable. But this surely does not rule out the possibility that a secondary debtor may emerge as an independent, operating company. One can readily visualize many situations in which the joint or related plans for reorganization of both the primary and secondary debtor would contemplate reallocation of the rail system between them; or disaffirmance of a lease between them. Clearly, under such circumstances independent reorganization of secondary debtors is appropriate.

Decisions of the ICC in which the Commission declined to approve proposals for secondary debtors to "go it alone" after having sought reorganization with the principal debtor are not to the contrary. *In re Missouri, Pacific Railway Co.*, 290 ICC 674 (1954) and 275 ICC 203 (1949); *Chicago, Rock Island & Pacific Railway Reorganization*, 244 ICC 329 (1937). It is apparent that those cases do not purport to establish or apply a general rule of law on the subject, but rather were decided on their respective facts. The First Circuit Court of Appeals has intimated a contrary view. *Boston Terminal v. Mutual Savings Bank Group Committee*, 127 F.2d 707 (1st Cir. 1942).

I also find unacceptable the proposition that any attempt to reorganize a secondary debtor under § 77 would necessarily be incompatible with reorganization of Penn Central pursuant to the 1973 Act. This is simply a *non sequitur*. The ability of the Association to devise a Final System Plan, and to acquire the rail properties embraced within such plan would remain unchanged.

In short, I have concluded that, having found that Penn Central is not reorganizable within the meaning of §207(b), I must nevertheless make separate determinations for the Secondary Debtors, and may properly find some or all of them to be reorganizable.

III. Jurisdiction to Make §207(b) Findings

As set forth in the corresponding portion of the Penn Central proceedings (Memorandum Findings and Order No. 1543), it is my view that a reorganization court clearly has jurisdiction to make findings with respect to the reorganizability of the debtor. Since I have concluded that some of the Secondary Debtors are reorganizable, it becomes

necessary to consider the remaining jurisdictional issue, left undecided in the Penn Central Opinion, namely, whether it is properly within the power of an Article III court to make findings with respect to the public interest.

Section 207(b) requires the Court to

> ". . . decide whether the railroad is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205) and that the public interest would be better served by continuing the present reorganization proceeding than by a reorganization under this Act."

Read literally, this language does not leave anything to be decided on the public interest question, since the Court is required to decide "*that* the public interest would be better served by continuing the present reorganization proceeding." In context, however, it is apparent that Congress intended the Court to decide "whether" the public interest would thus be better served.

To the extent that Congress itself has defined the public interest, a court may presumably perform the judicial function of determining whether the facts of a particular case bring it within that definition. But it is, generally speaking, a legislative matter to determine what the public interest is, and that function may not be delegated to a court. In short, the jurisdictional issue boils down to a question of whether Congress has provided adequate standards for making the comparative judgment on public interest which is required by §207(b).

On the assumption that Congress intended to act constitutionally, I conclude that the applicable standards are to be derived from the four corners of the 1973 Act

itself. I recognize that certain expressions of Congressional intent in other related statutes may be helpful to the attempt to verify what Congress defines as the public interest. For example, the Interstate Commerce Act, and §77 of the Bankruptcy Act, can properly be resorted to. But in the final analysis, since what is required is a comparison between §77 proceedings and proceedings under the Act,[3] the most recent expression of Congressional intent (in the 1973 Act) must carry greater weight.

Perhaps the clearest indication of Congressional intent lies in its allocation of the burden of proof on this issue. In the first place, if the Court finds that the public interest would be equally well served under either method of reorganization, the procedures of the 1973 Act must be chosen. The same result follows if the Court is unable to make a decision on the subject. Other portions of §207 (b) provide:

> ". . . Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found the railroad is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205) and that the public interest would be better served by such a reorganization than

[3] Actually, of course, the comparison is between a §77 proceeding without resort to the Act, and a proceeding under §77 as supplemented by the Act. Because of the language of §207(b), however, it is convenient shorthand to discuss the issue as a comparison between two mutually exclusive procedures.

> by reorganization under this Act . . . If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act . . . ."

Unquestionably, by this language, and by all of the provisions of the Act, including its preamble, Congress has expressed a decided preference for proceeding under the Act, rather than continuation of the §77 proceedings.

Stated otherwise, by placing the burden of proof upon those who argue for continuation of the §77 proceedings, while simultaneously failing to provide any standard by which a court might adjudge that course to be preferable, Congress has effectively deprived the court of any power to decide in favor of the §77 proceeding.

I recognize that there may be constitutional difficulties which would arguably preclude giving effect to any such conclusive presumption. But in my judgment, that constitutional issue need not, and indeed cannot adequately, be considered except in conjunction with the "180-day" findings as to whether the 1973 Act process would be fair and equitable to the Debtor's estate. If the processes of the Act are fair and equitable, then a Congressional directive to utilize those procedures would presumably not violate constitutional rights.

It is, however, appropriate to register a few caveats at this point. This reasoning assumes that any infringement of constitutional rights which would flow from adoption of the Act's procedures, whether in terms of the values assigned to rail properties, or in terms of the values, form, and timing of the consideration to be received for such assets, would be reflected in the 180-day finding. Moreover,

it might well prove constitutionally impermissible, in the case of a reorganizable debtor, to carry out the Congressional mandate that the proceedings must be dismissed if the proceedings under the 1973 Act are found to be other than fair and equitable. But all of these matters can best be considered in the context of the 180-day proceedings.

Two other possible lines of approach would seem to lead to the same result expressed above. One is perhaps implicit in what has already been stated, namely, a holding that the Act does not provide adequate standards for determining the public interest, and therefore no finding on that subject can properly be made. The other would be to derive from the four corners of the Act an expression of Congressional intent that the principal public interest factors to be considered are the preservation and continuation of essential rail service in accordance with a valid regional plan. It would then arguably follow that, since the Secondary Debtors are not operating railroads, and since their interests in rail properties are equally available for inclusion in a final system plan irrespective of whether they proceed under §77 or under the Act (since, among other reasons, all are controlled by Penn Central, which is a railroad in reorganization), it makes no difference to the public interest which statutory proceeding is followed. The net result would be that the Court would be unable to find that §77 would better accord with the public interest.

No matter which approach is adopted, it would seem that any Secondary Debtor which is found to be reorganizable should nevertheless, for the present at least, proceed under the 1973 Act.

IV. Feasibility of Making §207(b) Findings

Several factors make it extremely difficult to reach a rational conclusion as to the reorganizability of the Secondary Debtors. In the first place, their leases have neither been affirmed nor rejected. If the leases were affirmed, and if the Penn Central Trustees were able to pay the accrued and continuing rentals under the leases, obviously all of the Secondary Debtors could successfully reorganize. Indeed, in most cases their reorganization petitions could be dismissed as moot. And even if a particular lease were to be disaffirmed, if it should appear that the revenues derived from rail operations over the leased property exceeded the costs of operation, the lessor would have an administration claim against the Penn Central estate and would undoubtedly be able to reorganize eventually.

It is only with respect to the lessors whose operations have produced deficits that the issue would be in doubt; the Penn Central Trustees could ostensibly disaffirm the lease and assert a lien against the lessor's property to cover post-reorganization deficits.

The Penn Central Trustees have thus far been unable to take definitive action with respect to affirmance or rejection of leases of the Secondary Debtors. Initially, the principal reasons for this situation were the extreme complexity of the problems involved, the lack of adequate accounting information to form the basis of a judgment on the subject, the unavailability of cash to make the rental payments, and the fact that, for the most part, it was not in anyone's best interests to attempt to force a rejection of the lease. More recently, the enactment of the 1973 Act has made it virtually impossible for the Trustees to

take definitive action on these leases. Until the final system plan is adopted, it will remain difficult to make valid judgments concerning the burdens and benefits of particular leases. Moreover, in view of the drastic changes in patterns of rail traffic which will presumably be one consequence of the Final System Plan, data derived from past and current operations seem likely to provide an uncertain guide for the future.

The Secondary Debtors have attempted to explore the question of reorganizability on several alternate theories. These include: (1) affirmance of the lease; (2) rejection of the lease, with continued operation by Penn Central; (3) rejection of the lease, with lease or sale of all or part of the rail properties to a profitable railroad; and (4) rejection of the lease followed by independent operation by the lessor. In attempting to pursue these alternatives, the Secondary Debtors were faced with a lack of pertinent information, and the insufficiency of time within which to develop the required information.

First, the inadequacies of available data must be discussed. The Penn Central system was operated as a single railroad. Except for certain capital items, as to which accounts had to be maintained pursuant to the terms of applicable leases or mortgage identures, revenues and expenses were not separately accounted for under each lease. Beginning in about 1972, the Penn Central Trustees instituted the necessary accounting procedures so that the required raw data could be accumulated. After many months of effort, the Trustees' consultants, Wyer, Dick & Company, have recently completed a "segregation study" of all of the Secondary Debtors. It is important to emphasize just what this study is, and what it is not. It represents an attempt to allocate to each of the leased lines

its proper share of revenues and expenses. Allocating revenues involve many judgment questions, and many costs are allocated on a basis of systemwide averages. Thus, there may be merit to the contention that in some instances the segregation studies may not accurately reflect actuality.

A segregation study of this kind is useful in determining the profitability or non-profitability of operations over a particular leased line. But its usefulness in determining whether independent operation of that leased line would be profitable or not is marginal at best.

What is needed to form a valid basis for determining whether a particular leased line could operate independently are severance studies, which analyze what traffic such an independently operated road could expect to retain or attract, what its revenues from such traffic would be, and what its costs would be if operated independently. No severance studies are available; at the earliest, none will be available before August of 1974.

To add to the difficulty, as noted above, severance studies based upon data derived from past and current operations are unlikely to reflect accurately the changes which can be expected to flow from implementation of the final system plan under the 1973 Act.

For all of these reasons, I am inclined to agree with the contention advanced by many of the parties that requiring a finding on reorganizability by May 2, 1974 represents a violation of procedural due process of law. But while I have grave doubts on that subject, I have concluded that such findings should be attempted anyway, for two reasons: (1) arguably, the procedural deficiency would amount to a due process violation only in the event of a finding

of non-reorganizability, and (2) an erroneous refusal to make a finding could not be corrected later, whereas an inadequately supported or erroneous finding could be.

V. Reorganizability of the Secondary Debtors

In each of the Secondary Debtors' proceedings, a separate document is being filed, setting forth what may be termed subsidiary findings as to the present situation and future prospects of each of the Secondary Debtors. My views on the ultimate question of reorganizability of the Secondary Debtors will be outlined here.

By entering Orders, less than ten months ago, approving the reorganization petitions of the Secondary Debtors as having been properly filed, in good faith, this Court necessarily espoused the view that the Secondary Debtors were probably reorganizable. As noted above, the Trustees of the Secondary Debtors have had only about one month in which to familiarize themselves with the affairs of their charges and analyze their respective prospects. There is every reason to believe that, in establishing the deadline for the first decisions under §207(b), Congress did not actually have in mind these special circumstances relating to the Secondary Debtors. It therefore seems reasonable to hold that the burden of proof should be upon those who seek to establish that the Secondary Debtors are not reorganizable within a reasonable time under §77 of the Bankruptcy Act. There is nothing in the language of the 1973 Act which compels a different assignment of the burden of persuasion; and I should be reluctant to conclude that Congress, by enactment of the 1973 Act, intended to create a presumption against reorganizability, while at the same time including provisions which virtually

rule out any prompt decisions with respect to affirmance or disaffirmance of the leases of the Secondary Debtors.

Somewhat related to the foregoing approach is my feeling that the concept of reorganization "on an income basis" may be somewhat different in the case of a lessor railroad than in the case of an operating railroad. Lessors can be expected to reorganize on an income basis by reason of income derived from lease of the property, rather than from operations. The identity of the lessee is not necessarily a crucial factor. Since most of these leases were negotiated many years ago, it is reasonable to suppose that, where substantial portions of the rail properties involved appear likely to remain essential for serving the public, equivalent arrangements could be worked out which could support reorganization of the lessors. In my view, a "reasonable time" for exploring these possibilities has not yet expired.

In my view, the evidence attempting to project independent operation of a Secondary Debtor has principally a negative relevance. That is to say, it should be considered primarily in order to identify and weed out situations in which, by reason of light density, or identification of most of the trackage as potentially excess (in the preliminary report of the Department of Transportation) and similar factors it appears that a reorganization which contemplates continued operation of the property by someone is unlikely.

Applying the approaches outlined above, I have concluded that, with the exception of the Beech Creek, Erie & Pittsburgh, and Penndel Companies, all of the Secondary Debtors appear to be reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy

Act. In the case of the three exceptions, the evidence is such that I find myself unable to make a finding either way.

Separate orders will be entered in each of the Secondary Debtor's proceedings, in conformity with the conclusions expressed above.

/s/ JOHN P. FULLAM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE UNITED NEW JERSEY RAILROAD AND CANAL CO.,	Bankruptcy No. 70-347-A
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,	Bankruptcy No. 70-347-C
THE CLEVELAND & PITTSBURGH RAILWAY COMPANY,	Bankruptcy No. 70-347-D
THE CONNECTING RAILWAY COMPANY,	Bankruptcy No. 70-347-E
THE DELAWARE RAILROAD COMPANY,	Bankruptcy No. 70-347-F
MICHIGAN CENTRAL RAILROAD,	Bankruptcy No. 70-347-H
THE NORTHERN CENTRAL RAILWAY COMPANY,	Bankruptcy No. 70-347-I
THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY,	Bankruptcy No. 70-347-K
THE PHILADELPHIA & TRENTON RAIL ROAD COMPANY,	Bankruptcy No. 70-347-L
THE PITTSBURGH, YOUNGSTOWN AND ASHTABULA RAILWAY COMPANY,	Bankruptcy No. 70-347-M
PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY,	Bankruptcy No. 70-347-N
UNION RAILROAD COMPANY OF BALTIMORE,	Bankruptcy No. 70-347-O

All Secondary Debtors

(Identical Order in Each Proceeding)

ORDER NO.

AND NOW, this 2nd day of May, 1974, pursuant to §207(b) of the Regional Rail Reorganization Act of 1973, it is ORDERED, and this Court FINDS, as follows:

1. That the above-named Secondary Debtor is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205).

2. That the evidence available does not preponderate in favor of a finding that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization in accordance with the Regional Rail Reorganization Act of 1973; that the presumptions established by §207(b) of said Act have not been overcome; and that therefore, until further Order of this Court, the reorganization of the above-named Secondary Debtor shall be conducted pursuant to the Regional Rail Reorganization Act of 1973 as well as the pertinent provisions of §77 of the Bankruptcy Act.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEECH CREEK RAILROAD COMPANY,	) Bankruptcy No. 70-347-B
ERIE AND PITTSBURGH RAILROAD COMPANY,	) Bankruptcy No. 70-347-G)
PENNDEL COMPANY,	) Bankruptcy No. 70-347-J

All Secondary Debtors

(Identical Order in Each Proceeding)

ORDER NO.

AND NOW, this 2nd day of May, 1974, it is ORDERED, and the Court FINDS, that the record as a whole does not permit a decision at this time as to whether or not the above-named Secondary Debtor is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205), within the meaning of §207(b) of the Regional Rail Reorganization Act of 1973.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

FULLAM, J. July 2, 1974

I. Procedural Posture

After four years in reorganization under §77 of the Bankruptcy Act, the estate of the Penn Central Transportation Company has reached another crucial milestone. Pursuant to §207(b) of the Rail Reorganization Act of 1973 (hereinafter "RRRA" or the "ACT"), the reorganization court is required to determine whether or not the railroad "shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act." The Court is required to decide in favor of utilizing the RRRA unless it "finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization."

On June 25, 1974, in the case of *Connecticut General Insurance Co., et al. v. United States Railway Association, et al.*, Civil Action No. 74-189, a three-judge court, of which the writer was one member, declared certain provisions of the RRRA to be unconstitutional, and granted an injunction partially restraining its enforcement. Specifically, the court held that the Act is unconstitutional insofar as it fails to provide compensation for the diminution in value of the Debtor's estate which would result from continuing losses from rail operations during the period preceding implementation of any Final System Plan under the statute.

The threshold question, therefore, is the effect of the *Connecticut General* holding upon the findings to be made

by reorganization court under §207(b) of the Act. There are several possibilities. One would be to hold that, since the certification of a Final System Plan under the statute has now been enjoined, there is no "process" to be evaluated, and therefore no need for §207(b) findings at this time. But under §207(b) itself, implementation of which has not been enjoined, a failure by the reorganization court to make findings by July 1, 1974 would have the effect of requiring reorganization pursuant to the RRRA. A second possibility would be to treat the *Connecticut General* decision as controlling, and to hold that, since the statute is unconstitutional, it must obviously be found not to provide a process which is fair and equitable. But the majority of the *Connecticut General* court held that the issues as to the constitutional validity of the provisions of the RRRA concerning conveyances of rail properties pursuant to a Final System Plan were not yet ripe for decision. One of the reasons advanced for declining to reach those issues was the belief that reorganization courts might make 180-day findings on this subject which would preclude the possibility of such conveyances. It thus appears that the majority of the *Connecticut General* court did not regard its decision as obviating the necessity for §207(b) decisions by the reorganization courts.

At least two other factors must also be considered. The appeal period in the *Connecticut General* case has just commenced to run, and it would seem improvident to assume that there cannot possibly be any change in the situation during, or as the result of, the appellate process. Moreover, the *Connecticut General* case dealt only with issues of facial constitutionality, whereas the §207(b) process involves the actual application of the statute. Whether or not the conclusions reached must be the same, it would seem that a somewhat different approach is required.

For all of the foregoing reasons, I have concluded that a §207(b) determination should be made at this time, and should be made on essentially the same basis as if the *Connecticut General* case had not been decided. However, rather than restate the analysis from my *Connecticut General* Opinion, that Opinion is incorporated herein.

II. Background

From the very outset of this reorganization proceeding, it was apparent that in order to achieve a successful financial reorganization, there would need to be drastic changes in the Debtor's operations and in the regulatory environment in which it functioned. The initial task of the Trustees was to ascertain the dimensions of the problem, and to keep the enterprise afloat while the necessary studies were being conducted. Faced with an immediate cash shortage, contributed to in large measure by a congressionally mandated wage settlement, the Trustees were unable to borrow money on trustees' certificates unless the certificates were to be guaranteed by the federal government. Congress responded to this initial crisis by passing the Emergency Rail Services Act of 1970, pursuant to which the Trustees were able to borrow $100 million from the private sector on the basis of government guarantees.

On February 10, 1971, seven months after their appointment, and shortly after their trustees' certificates were marketed, the Trustees filed their first report on the status of the reorganization. In that report, they stated:

> ". . . It is a fact that Penn Central is presently locked by circumstances beyond managerial control into a situation which had best be recognized *now* as completely precluding viability unless certain constraints are removed, or other arrangements are made to compensate for their effect" (emphasis in original).

The Trustees identified four areas in which changes were necessary: (1) elimination of losses on passenger service; (2) rationalization of the freight plant through elimination or subsidy of uneconomic lines; (3) more flexible rate and division procedures; and (4) improved labor productivity through reduction of excess employees. For convenience, these goals are referred to as "conditions to viability." Within a few months thereafter, the Trustees, aided by expert consultants, had reached a tentative conclusion that reduction of the total route mileage of the Penn Central system by about 40% (*i.e.*, to a "core" of 12,000 to 15,000 miles) would probably be required in order to make the remaining system viable. Every study since that time, including the preliminary report of the DOT and the report of the Rail Services Planning Office of the ICC filed pursuant to the RRRA, has been consistent with that view.

Beginning in 1971, and continuing until immediately before enactment of the RRRA, the efforts of the Trustees were directed to attempting to achieve the conditions of viability. They met with limited success in some areas and near total failure in others. Through negotiations of contractual arrangements with Amtrak and various regional commuter authorities, the Trustees succeeded in substantially reducing, although not eliminating, the losses on passenger service. But available abandonment procedures failed to produce prompt disposition of abandonment applications. On the labor front, a nationwide

settlement of the longstanding fireman-manning dispute provided some improvement, but persistent disputes over the appropriate sizes of train crews, and over work rules, were not resolved. The Trustees' reports of February and October 1972 stressed the need for greater progress in achieving the conditions to viability.

In their January 1973 report, the Trustees reported that, as a result of interim losses and the condition of the physical plant, substantial government funds would be needed in order to make the Penn Central viable within a permissible time period. At about the same time, having exhausted the lengthy procedures of the Railway Labor Act, without success, in their attempt to obtain a resolution of the crew consist dispute, the Trustees promulgated their new work rules, designed to achieve, solely by means of attrition, reductions in the size of crews, except where arbitrators might find, in particular cases, that such reductions would impose excessive work loads or be inconsistent with safe operations. The promulgation of the new work rules precipitated a strike, and Congress responded on February 9, 1973, by the passage of Senate Joint Resolution 59-2, which, in effect, nullified the work rules changes, required the parties to maintain the *status quo* for a further period of 90 days, and directed the Department of Transportation to make a study of the problems of railroads in the northeast and to report to the Congress within 45 days.

The time within which the Trustees were permitted to ratify or disaffirm executory contracts, and within which a reorganization plan was to be filed, had been extended from time to time; the then current extension was due to expire April 1, 1973. On March 6, 1973, I filed Memorandum and Order No. 1137, granting a further extension,

but directing the Trustees, not later than July 1, 1973, to file either a plan of reorganization for the Debtor, or their proposals for liquidating the enterprise. In the course of that Memorandum, I made the following observations:

> "Whether the constitutional limit [of interim erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.
>
> "The essence of §77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a reasonable time in order to permit rehabilitation of the enterprise. Whenever it appears that there is no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears. [I]t is apparent that the required profitability cannot be achieved unless substantial further progress is made in the immediate future to meet the conditions upon which the projected profitability is based . . . .
>
> "It has long been apparent that the particular problems of Penn Central cannot be completely divorced from problems of national transportation policy. Railroads are, after all, a regulated industry. However unappealing may be the notion that a regulated

industry can become bankrupt, the Trustees' efforts to rehabilitate the Debtor are circumscribed by existing statutes and regulations. To the extent that these statutes and regulations . . . preclude the exercise of self-help in achieving profitability, the legislative and executive branches of government must be looked to for solutions, if solutions are to be forthcoming.

"And this is as it should be, for it is those branches of government which should determine whether the kind of railroad which could emerge from a private income-based reorganization would be consistent with long range goals of national transportation policy. Such matters . . . are clearly beyond the province of the Trustees, the other parties to this reorganization, and this Court.

. . . .

"The legal and constitutional rights of the parties to this reorganization should be evaluated in the light of whatever changes Congress sees fit to enact.

"By the same token, however, this Court cannot ignore the realities of the Debtor's situation. On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973." *In Re Penn Central Trans. Co.*, 355 F. Supp. 1343, 1344-46 (E.D. Pa. 1973).

Throughout the balance of 1973, as a result of careful and intensive effort by both Houses of Congress and the Executive Branch, the legislation which ultimately became the RRRA took shape. At the same time, the parties were proceeding before the ICC for approval of various proposed plans of reorganization/liquidation, and some of the parties were pressing in this Court for prompt termination of rail operations and dismissal of the §77 proceeding itself. By a series of actions and inactions which need not be detailed here, this Court held all such proposals in abeyance pending action by Congress on the RRRA.

It is clear that, apart from the impact of the RRRA, there has been no fundamental improvement in the Debtor's prospects. In reviewing the Debtor's situation pursuant to the initial requirement of §207(b) of the Act (the so-called "120-day findings"), I concluded:

> "[T]here is no prospect that, in the absence of fundamental changes which the Trustees are precluded from bringing about, the Debtor can be reorganized as an operating railroad. Even if the optimal configuration [of the rail system] could be achieved, it appears unlikely that the Trustees could obtain the resources to sustain operations in the interim, or that the final result would make it possible to provide for interim administration expenses and support a recapitalization on a fair and equitable basis." *In Re Penn Central Trans Co.*, (E.D. Pa. 1973), slip op. at p. 19.

Unquestionably, therefore, the presumption in favor of accepting the solution presented by the RRRA is unusually

strong, not only because the Act expressly incorporates such a presumption, but for obvious practical reasons as well. A court would be justified in precluding resort to the procedures of the RRRA only for the most compelling reasons.

III. The Merits

A.

The Indenture Trustees on behalf of their bondholders, the Institutional Investors, the New Haven Trustee, and the Penn Central Company, the sole stockholder of the Debtor, all press for a finding that the Act does not provide a fair and equitable process. Thus, opponents of the Act include all of the secured creditors, all unsecured creditor interests actively participating in the reorganization proceeding, and all of the stockholder interests. No creditor or stockholder has expressed a different view. The Trustees of the Debtor urge the Court to make a conditional finding based upon their contention that the Tucker Act provides an adequate remedy for any unconstitutional lack of fairness and equity which might result from application of the Act. In effect, they suggest a finding which would remain valid only upon condition that the availability of a Tucker Act remedy is conclusively established by a decision of the Supreme Court of the United States.

United States Railway Association and the Department of Justice, in a joint presentation, urge an affirmative finding that the Act does provide a fair and equitable process. Their contentions may be summarized as follows: Congress has determined that the Act provides a fair and equitable process, and has established machinery adequate to insure that its intention will be carried out. This Court

should not attempt to second-guess the Congressional judgment. The only possible basis for a finding that the Act does not provide fair and equitable process would be a conclusion that the end result would violate constitutional rights. In the unlikely event that such a contingency should arise, the Tucker Act provides an adequate remedy.

The record contains a great deal of opinion evidence, with supporting documentation and calculations, designed to show that it is highly improbable, even impossible, for Conrail to be a successful enterprise. Taken as a whole, this evidence is to the effect that the common stock of Conrail will have little or no value, because the corporation will be unable to generate enough net rail operating income to meet its fixed charges and leave anything significant for the stockholders; and that Conrail will run out of cash within a couple of years after commencing operation. No evidence has been offered to the contrary, nor has the government effectively challenged the salient features of the creditors' evidence. Nevertheless, I agree with the contention of the government that it would be both premature and inappropriate for this Court to express a judgment as to Conrail's prospects for viability.

USRA is required to design a rail system which is both "financially self-sustaining" and "adequate to meet the rail transportation needs and service requirements of the region." It is true, of course, that the mere existence of this Congressional mandate cannot guarantee that the attempt will be successful. But it is obviously beyond the power of a district judge to substitute his own assessment of the feasibility of a legislative program for that of Congress. Any such attempt would be squarely contrary to the concept of a tripartite form of government.

The task of designing a financially viable rail system, and therefore of making at least the initial assessment of its viability, has been committed to USRA, and not to this Court. Congress has reserved a veto power over USRA's recommendations for the Final System Plan. The task of evaluating Conrail's stock and other securities has been committed to the Special Court, and is to be performed at a time when all concerned will have more of the necessary information than is now available. It is proper to assume that, if USRA finds it impossible to design a profitable system, it will say so. In any event, the validity of its viability assessment can be tested before the Special Court at the appropriate time.

Thus, if this Court's §207(b) finding were to depend solely upon the question of the present financial prospects of Conrail, there would be nothing for this Court to decide. But §207(b) plainly contemplates a meaningful decision of some sort; I am reluctant to accept the suggestion that §207(b) was inserted merely to create the appearance of a judicial act, and not its reality, or was designed merely for camouflage purposes, so that what is really an eminent domain statute would have the appearance of a reorganization statute. I see no need to go beyond the language of §207(b) itself. In the terms of that section, this Court is required to determine whether the RRRA "provide[s] a *process* which would be fair and equitable to the estate of the railroad in reorganization . . .". I interpret these words to mean that the reorganization court is now to determine whether, if the procedures of the Act were to be followed in the case of the particular debtor, those procedures can be characterized as "fair and equitable" to the estate. The focus is upon the process; concrete assessments of the results of the process are obviously impossible at this time. (It is this very

uncertainty which makes it necessary to consider the deficiency judgment and stock issues discussed below.)

There are several areas of concern with the adequacy of the statute's procedures. In the first place, several related problems stem from the provisions of the Act regarding the conveyances of rail properties to Conrail pursuant to the Final System Plan. Understandably enough, the Act provides that, once a Final System Plan has been approved by USRA, submitted to Congress and not rejected, and certified to the Special Court, no court can change it or interfere in any way with its implementation. The Final System Plan is to represent the judgment of USRA and Congress concerning the best rail system for meeting the needs of the region, and there is no reason for participation by the parties, or by the courts, in those determinations. But the Final System Plan also represents a preliminary determination of the values of the properties to be conveyed, and of the values attributable to the consideration to be paid. Under normal concepts of due process in the administrative field, one would expect to find some opportunity for obtaining and considering the views of the affected property owners in advance of such value determinations. The drafters of this Act apparently considered that the later opportunity for hearings before the Special Court would obviate the need for administrative hearings. The validity of this approach would seem to turn upon whether the Special Court is expected to give any significant degree of deference to the administrative valuations. On that point, the statute is not altogether clear.

Under §209(b), when delivering the Final System Plan to the Special Court, USRA is required to certify, *inter alia*,

> "(3) The amount, terms, and value of the securities of the Corporation (including any obligations of the Association), to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan. . .".

Section 303(c) requires the Special Court, "giving due consideration to the findings contained in the final system plan," to decide, *inter alia*, whether the proposed exchanges would be fair and equitable.

While the issue is not free from doubt, I am inclined to believe that any defect inherent in the absence of administrative hearings on the questions of valuation can safely be disregarded for present purposes, on the assumption that the Special Court would give to USRA's valuation findings only such weight as would be legally permissible.

A more serious, or at least more noticeable, problem stems from the fact that the conveyances and transfers pursuant to the Final System Plan are mandated to occur in advance of any judicial scrutiny and in the absence of any judicial determination as to the fairness and equity of the proposed exchanges. Arguably, even this defect might be remedied if the Special Court were empowered to set aside the conveyances if it should find unfairness or inequity. But it is clear that the Act does not permit any such curative action by the Special Court. And finally, even this series of problems could perhaps be overlooked if the Special Court could, by some alternative means, see to it that the respective estates received the "constitutional minimum" due them from their properties. But it is entirely clear that the Special Court, upon finding that the transfers are less than fair and equitable,

is limited to reallocating the securities specified in the Final System Plan and, if the result is still unfair or inequitable, to imposing a deficiency judgment against Conrail.

USRA is authorized to issue up to $500 million of debt obligations guaranteed by the United States, and to make those securities available to Conrail for use in purchasing rail assets. The extent to which this authority would actually be exercised would apparently be determined by USRA, in formulating the Final System Plan. It is arguable, for example, that if USRA should propose a plan which did not contemplate the use of any government-guaranteed obligations as part of the consideration for rail assets, the Special Court would be unable to require such issuance. Be that as it may, it is clear on the record in this case that rail assets of Penn Central would comprise a very large percentage of the total Conrail system, and there is every reason to suppose that the included properties would be worth considerably more than $500 million. Since no one knows, or can know, at this time, the value of any stock or other securities which Conrail might issue, it would be highly imprudent to assume that there will be no need to resort to the deficiency judgment. Yet obviously, such a judgment would be relatively pointless, serving merely as a further reduction in the value of the common stock.

Another set of problems relating to the conveyance features of the Act arise from the many uncertainties concerning valuation standards. Before irretrievably committing the estate of the Debtor to the processes of the RRRA, it would be extremely helpful, and perhaps actually essential, that the ground rules concerning valuation should be clearly perceived. The statute makes clear that neither more nor less than the "constitutional minimum" payment

is intended. The legislative history of the Act suggests that many responsible public officials may be proceeding on the assumption that the common stock of Conrail (*i.e.*, the capitalized value of its prospective earnings) necessarily and automatically establishes the value of the rail assets conveyed to Conrail, even if those assets had a higher liquidation value, and even though their value for "highest and best use" might be much greater. Indeed, the government makes precisely that argument in the present proceeding. It becomes necessary, therefore, to make two comments on that subject: (1) If the government's definition of "constitutional minimum" is correct, then every railroad in reorganization would be better off in immediate liquidation, than under the processes of the RRRA. (2) If that valuation approach is incorporated in the Final System Plan submitted to Congress, but later proves to have been incorrect, then (a) at the very least, the actual capital structure and viability prospects of Conrail would be drastically different from that proposed by USRA and reviewed by Congress; and (b) if the government and the Trustees are correct in their assertion that there is a Tucker Act remedy, the direct cost to the taxpayers might prove vastly greater than Congress intended. In short, advance clarification of the valuation standards would seem to be extremely desirable from the standpoint of Congress and USRA, as well as from the standpoint of the bankrupt estates.

Another problem relating to valuation is the lack of any mechanism for establishing a relationship between the values to be assigned to the rail properties conveyed, and the valuation of the interests of secured creditors holding liens against those properties. There are several facets to that problem. In the first place, the timing is off. In determining whether a plan of reorganization is fair and

equitable, it is necessary to determine the extent to which particular groups of creditors are secured, and the value of their respective securities, so as to be sure that they will receive equivalent value before any junior classes of claimants participate. Since the exchanges under RRRA would be between Conrail and the Debtor's estate, rather than the creditors, the problem of later recognition of the correct treatment of the creditors in a reorganization plan would be rendered quite difficult.

Moreover, the valuation of the property for sale to Conrail might very well not be on a basis which would permit rational allocation of the consideration on a segment-by-segment basis for purposes of later assigning lien values. And that difficulty would itself be greatly magnified by the fact that Conrail will presumably be made up of parts of various existing railroads, blended together in a smaller system designed to handle the traffic now being handled by several different railroads.

A further difficulty with the statute is the lack of precision in defining what "other benefits of the Act" are to be taken into account as part of the purchase price for the rail properties conveyed to Conrail. For example, if the amount payable for labor protection (up to $250 million is authorized by the Act) is to be charged back against the estate as a credit against the purchase price payable for the rail properties, a major incentive for utilizing the processes of the Act would be removed.

Separately considered, the problems specifically relating to valuation issues are not necessarily such as to render the Act's procedures unfair and inequitable, but they are factors which enter into the overall assessment.

B.

As discussed in Part IV of my concurring Opinion in the *Connecticut General* case, analysis of the RRRA reveals a mixture of sale, reorganization, and eminent domain concepts. Whatever may be the appropriate label, the fundamental disagreement among the parties concerns the constitutional propriety of compelling the Debtor's estate to exchange some of its rail properties for Conrail stock. It was unnecessary to decide that question in the *Connecticut General* case, but I see no way to avoid it in the present litigation, where an evaluation of the fairness and equity of the RRRA is mandated.

All of the reported cases are uniform in ruling that, when private property is taken for public purposes in exercise of the power of eminent domain, assurance of payment in cash or equivalent is a constitutional requirement. *Almota Farmers Elev. & Whse. Co. v. U.S.*, 409 U.S. 470 (1973); *U. S. v. Reynolds*, 397 U.S. 14 (1970); *U.S. v. Miller*, 317 U.S. 369 (1943); *Olsen v. U.S.*, 292 U.S. 246 (1934); *VanHorne's Lessee v. Dorrance*, 2 Dall 304 (Cir. Ct. Pa. Dist. 1795); *see also* Nicholas, *Eminent Domain* §8-2 (3d Rev. Ed. 1970) and cases cited therein. In the present case, the government argues that the RRRA is not an exercise of the power of eminent domain, but that in any event the "just compensation" requirement of the Fifth Amendment can be fulfilled by payment in Conrail stock.

Essentially, it is the position of the government that if a secured creditor can be required to take inferior securities as part of a reorganization plan, it follows that the Debtor's estate can be required to take stock in exchange for property subject to the liens of secured creditors.

In other words, the assumption is that the kind of governmental compulsion represented by the RRRA is qualitatively identical to that represented by the provisions of §77(e) of the Bankruptcy Act relating to the confirmation and cramdown of a plan of reorganization; and that "just compensation" can be equated to §77's requirement that a plan be "fair and equitable."

While the government's argument cannot be dismissed out of hand, I believe Judge Friendly's observation in the New Haven litigation is pertinent here:

> "[T]he present case may well be one where a volume of history must prevail over a page of logic." *New York, N.Y. & H.R.R. Co. First Mortgage 4% Bondholders Committee v. U.S.*, 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969).

By and large, the pre-§77 equity receiverships did not result in the dismantling of railroads, because the economic factors were such that continuation of the enterprise produced greater values than liquidation would have produced. The creditors foreclosed their liens, but because the railroad was worth more alive than dead, they continued to operate it. Sound financial planning required that fixed charges be realistic; the solution was to fix a debt-equity ratio which made it necessary for some of the bondholders to receive stock. The imposition of §77's fair and equitable standard, with the judicial gloss of the absolute priority rule, was simply a more efficient and just way of attaining the equity receivership result. For railroads plagued by over-capitalization, both the equity receivership mechanism and §77 provided a method of avoiding unnecessary losses to private interests, while fostering the public interest in rail transportation.

As pointed out in my *Connecticut General* concurrence, it is the reasonable prospect of preserving "going concern" values in excess of liquidation values which comprises the constitutional underpinning for §77 itself. And in the most pertinent precedent, the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the Supreme Court seems to suggest that even a voluntary agreement to accept stock in payment for rail properties sold pursuant to §77(b) (5) may be unfair and inequitable in the absence of sound guarantees as to the value of the stock.

There are significant differences between the distribution of stock to secured creditors in connection with a reorganization, and the scheme of the RRRA. Under the Act, a debtor whose rail properties, by definition, do not now produce income in excess of fixed charges (or for that matter in excess of operating expenses), and have no present prospect of doing so, is required to exchange its properties for the stock of Conrail. The Debtor is forced to forego obtaining whatever value there is in its rail assets, in return for the attendant risks of Conrail's equity securities. This is not to say that Conrail stock will necessarily involve excessive risk, but rather to point out that the risk is being imposed by the government, without the consent of the interested parties.

A requirement that property be exchanged for stock is in essence a denial of the railroad's right to terminate service and liquidate. It is this control over the ultimate disposition of the Debtor's assets that appears to be equivalent to an exercise of the power of eminent domain. But if there is some independent basis for sustaining compulsory continuation of rail operations, there would not necessarily be a Fifth Amendment violation in requiring acceptance of stock in exchange for the properties. The

government has now argued, for the first time, that there will never be any necessity to impose a deficiency judgment against Conrail, because, as a matter of law, the value of the Debtor's rail assets equals the value of Conrail's common stock. Ignoring for the moment the complications stemming from the fact that Conrail will be composed of properties from more than one estate, it is significant that this new valuation argument is necessarily based upon the premise that the government can properly require railroads to operate indefinitely.

The justification for any such thesis must be found in the public interest of avoiding the widespread dislocations which would result from termination of the Debtor's rail service. The issue is not whether governmental action may properly be taken to avoid such dislocations, but rather whether the method selected by Congress, the RRRA, is a constitutional method of achieving that legitimate public goal. In short, the question is whether the government can avoid such disruptions by imposing the costs and risks of a possible solution upon the Debtor's estate. Support for an affirmative answer to that question is to be found, if at all, in the concept that the privilege of a government-protected railroad monopoly gives rise to a residual claim in the public for continuation of railroad operations, to wit, the notion of "common carrier responsibility" which finds statutory expression in §1(18) of the Interstate Commerce Act.

The legitimacy of "common carrier responsibility" is, of course, not in question, but the duration of that responsibility is. Stated briefly, the issue is whether the government may treat a common carrier whose government-sponsored monopoly is no longer profitable, as if it remained profitable.

In the so-called Granger case, *Munn v. Illinois*, 94 U.S. 113 (1876), the Supreme Court articulated the "public interest" theory upon which economic regulation was based for almost 60 years:[1]

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to the use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to control." 94 U.S. at 126.

In the case of railroads, the right to withdraw is not unqualified. State legislatures early authorized regulatory agencies to control the abandonment and termination of services of rail carriers. Since railroads operate under government-created monopolies, that extension of regulatory power was both logical and lawful, if the carrier's total operations were profitable. Cherington, *The Regulation of Railroad Abandonments*, 17-25 (Harv. 1948).

However, when a carrier's operations are not profitable, it is unconstitutional to require their continuance. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920);

[1] In *Nebbia v. N. Y.*, 291 U.S. 502 (1934), the Court abandoned the necessity of finding that a business activity affected the public interest as a condition precedent to state or federal regulation.

Bullock v. Florida ex rel. Railroad Commission, 254 U.S. 513 (1921); *Mississippi R.R. Commission v. Mobile & Ohio R.R. Co.*, 244 U.S. 388 (1917). Enactment of the Transportation Act of 1920, which contains what is now §1(18) of the Interstate Commerce Act, did not alter this constitutional doctrine. *Railroad Commission v. Eastern Texas R.R. Co.*, 264 U.S. 79 (1924). The Supreme Court has recently recognized the continuing validity of those cases, in the *New Haven Inclusion* case, *supra* (399 U.S. at 491). Recent decisions in the Third Circuit, *In the Matter of Penn Central Transportation Co.*, 494 F.2d 270 (3d Cir. 1974) (Columbus options case), and in the First Circuit, *In Re Boston & Maine Corp.*, 484 F.2d 369 (1st Cir. 1973), as well as the decision in *Connecticut General*, *supra*, are all to the same effect. Indeed, the government does not dispute, as an abstract principle of constitutional law, the doctrine that there may be a point beyond which a railroad cannot constitutionally be required to continue to provide service.

It appears to be the government's contention that in the present case the Debtor can be forced to continue rail operations, not indefinitely, perhaps, but at least for a substantial further period, without regard to whether the accruing administration expenses reduce the value of the estate, or whether the end result will be to accord to the estate less than its present liquidation value. The monopoly rationale of railroad regulation, as noted above, does not support that argument. And I am unable to perceive any basis in the general concept of police power for upholding that result.

The government may, of course, preclude uses of property which are harmful to the public, and even render valueless under certain circumstances private property

without compensation in order to obviate the harm, *e.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of cedar trees spreading disease to apple orchards). But, except for the monopoly rationale, there is no authority for affirmatively requiring uncompensated continuation of a use of property merely because cessation of that use would be detrimental to the public.[2] Indeed, there are constitutional limits to governmental restrictions of the use of property, when such restrictions are confiscatory. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

I am satisfied, therefore, that the use of common stock to pay for the rail assets conveyed pursuant to the Final System Plan cannot be justified on the basis of any constitutional doctrine yet announced by the Supreme Court. In my view, the RRRA in its present form does violence to the Constitution, whether considered as a reorganization statute, or as an eminent domain statute, or as a combination of the two. This does not, however, necessarily mean that the use of stock as payment might not be proper in a slightly different statutory setting.

From the standpoint of creditors, interim erosion is the most pressing problem. Given protection against that ongoing loss, the delay involved in structuring a Conrail and ascertaining the reciprocal values involved would surely be constitutionally acceptable. From the standpoint of the public interest, achieving a permanently satisfactory

[2] Grade crossing cases provide a further analogy. If the railroad's facilities are inadequate and dangerous, the railroad may be assessed the cost of the improvement. *Atchison, Topeka & S.F. Ry. v. Public Utility Commission*, 346 U.S. 346 (1953). But if the project is needed merely to improve the flow of traffic on an interstate highway, the railroad is not required to bear the cost, *Nashville & St. Louis Ry. v. Walters*, 294 U.S. 405 (1935).

rail system at minimal public cost is the important goal. The increased public cost for supporting interim operations would seem to be relatively modest in comparison to the total cost of outright condemnation.

If a solution can be found to the immediate problem of interim erosion, several possibly acceptable alternatives involving the use of Conrail stock to pay for some or all of the assets could readily be explored. The basic techniques of the RRRA might be used to produce a plan of reorganization which could properly provide for the use of stock, if the necessary procedural safeguards were added. The values assigned to the Conrail stock might be underwritten in some fashion. Or, it might be possible to construct a satisfactory constitutional theory which would permit the use of stock to the extent of the excess of going concern value over net liquidation value. All of these matters are obviously not within the proper scope of this Court's responsibility. They are mentioned here only for the purpose of emphasizing that, notwithstanding the categorical nature of some of the arguments presented in this case, I am not persuaded that the inevitable choice is between the RRRA in its present form, on the one hand, and immediate nationalization of the railroads on the other.

IV. Conclusions

Throughout the *Connecticut General* litigation and the proceedings under §207(b) of the RRRA, as well as in the post-RRRA segment of the Penn Central reorganization proceeding itself, there has been constant and repeated emphasis upon the various inadequacies of the RRRA. It is important, however, to emphasize the many positive aspects of the statute. It undoubtedly represents a constructive

and imaginative approach toward a solution of problems which have plagued this country for generations, but which have compellingly surfaced only in recent years. I agree with the Trustees that the basic approach of the statute is fundamentally sound. If I were persuaded that Congress had intended to permit recourse to a Tucker Act remedy in the event that implementation of the RRRA proved violative of constitutional rights, an affirmative §207(b) finding might be permissible. But, in the absence of any clearly expressed provision to that effect in the statute, I believe reliance on that possibility would be misplaced.

It is easy to picture the present controversy as a dispute between grasping creditors, on the one hand, and the public interest, on the other. But that simplistic picture is entirely inaccurate. In the first place, the creditors and stockholders of the Penn Central Transportation Company have exhibited commendable patience and restraint in supporting the continued operation of the railroad during reorganization, at a cost of nearly $1 billion. More importantly, the immediate impact of continued loss operations is being absorbed by state and local taxing authorities, and by prebankruptcy personal injury claimants, whose judgments have been held in abeyance for more than four years, and cannot be paid until all senior claimants are taken care of in a plan of reorganization. Whatever may be said of trade creditors and investors, surely the local taxing authorities and personal injury claimants cannot be said to have made an investment decision of any kind or to have extended credit voluntarily to the railroad.

Among the 160,000-odd stockholders, and the upwards of 50,000 bondholders, I have no doubt that a significant portion do not readily conform to the image of sophisticated

investors. And even if they were all established financial institutions, some mention should be made of the generally accepted view that our system of private enterprise can best be preserved if investor confidence is not unnecessarily jeopardized.

Be all that as it may, for the reasons discussed above, I am compelled to conclude, reluctantly, that the RRRA falls short of providing a process which would be fair and equitable to the Debtor's estate in the following respects:

1. The Act requires the Debtor to continue to operate the railroad, for its own account, until such time as the Final System Plan is implemented. There is no prospect that such operations can be conducted, except at huge losses. The Act makes no provision for compensation to the estate or its creditors for the resulting erosion.

2. The Act does not permit judicial determinations with respect to the values of the properties to be conveyed, or the value and adequacy of the consideration to be paid for such properties, in advance of the conveyance, and the subsequent judicial review of these matters does not affect the finality of the conveyance.

3. Since USRA, with the approval of Congress, is to determine the nature of the consideration to be paid for the transferred assets, and judicial remedies are limited to reallocation of the securities proposed by USRA and the entry of a deficiency judgment against Conrail, the Act does not assure that the Debtor's estate will actually receive the equivalent of the "constitutional minimum" value of the properties conveyed.

4. It is beyond the power of a reorganization court, including the Special Court, to order the conveyance of

properties free and clear of liens in exchange for common stock, except perhaps to the extent that the sale price exceeds the net liquidation value of the property conveyed. This is particularly true where there is no guarantee of the value of the stock or its future earnings.

5. Implementation of the Final System Plan pursuant to the Act cannot be regarded as equivalent to consummation of a plan of reorganization, or a step in or part of such a plan of reorganization, because (a) the conveyances would become irrevocable before there would be any opportunity for participation by the estate or its creditors in the valuation process, (b) the conveyances would become irrevocable in advance of any judicial review of fairness, valuations, etc.; (c) the conveyances would become irrevocable before there could be any determination of the relative rights of creditors and the value of their security or their treatment in the reorganization process; the creditors would merely lose their liens on the properties conveyed.

6. Implementation of the Final System Plan cannot be legally justified as a sale of property by the Trustees, or as consummation of a reorganization plan, for the reasons specified above. To the extent that the Act represents an exercise of the power of eminent domain, it is unfair and inequitable, in that it does not provide for just compensation in cash or its equivalent, assured in advance of the conveyance. There is no other basis upon which the constitutional validity, or the fairness and equity, of implementation of the Act can be upheld.

7. Under the provisions of the Act, the only judicial determinations which can have significant effect in protecting the rights of the railroad estates and their creditors

must be made at a time when substantially all of the information pertinent to those judicial decisions is unknown and unknowable.

Accordingly, an appropriate order has been entered, expressing this Court's finding that the RRRA, in its present form, does not provide a process which would be fair and equitable to the Debtor's estate.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of	:	In Proceedings for the Reorganization of a
PENN CENTRAL TRANSPORTATION COMPANY,	:	Railroad
Debtor	:	Bky. No. 70-347

ORDER NO. 1596

AND NOW, this 1st day of July, 1974, in conformity with the requirements of §207(b) of the Regional Rail Reorganization Act of 1973, this Court FINDS and hereby ORDERS:

1. That the Regional Rail Reorganization Act of 1973 does not provide a process which would be fair and equitable to the estate of the Debtor.

2. That the reorganization of the estate of the Debtor shall not be carried out pursuant to the Regional Rail Reorganization Act of 1973.

3. That this Finding and Order shall be stayed pending the final determination of the Special Court pursuant to the Act.

/s/ John P. Fullam
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MEMORANDUM IN SUPPORT OF FINDINGS AND ORDERS PURSUANT TO THE SECOND CLAUSE OF § 207(b) OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973 IN THE SECONDARY DEBTORS' PROCEEDINGS

FULLAM, J. July 2, 1974

Concurrently herewith, I have filed a Memorandum in support of findings and Order No. 1597 in the Penn Central proceedings, setting forth the reasons leading to my conclusion that the Regional Rail Reorganization Act of 1973 (hereinafter "RRRA" or the "Act") does not provide a process which would be fair and equitable to the Penn Central estate. Those same reasons justify the entry of similar orders in the cases of each of the Secondary Debtors. There are, however, certain issues uniquely applicable to the Secondary Debtors which require brief additional discussion.

The Secondary Debtors contend that, having been found reorganizable, they are no longer "railroad in reorganization" as defined in §102(12) of the Act. I do not believe the definition should be read so narrowly. While 12 of the 15 Secondary Debtors have been found to be reorganizable, there has not been (and, for the reasons discussed in my May 2, 1974 Memorandum in the Secondary Debtors' proceedings, cannot be) a finding that the public interest would be better served by having them reorganize under §77 alone, than by recourse to the provisions of the RRRA. The definition must be read in conjunction with §207(b). It seems reasonably clear that

Congress intended to exclude from the applicability of the Act (1) railroads as to which the reorganization court finds both that they are reorganizable and that their reorganization outside the Act is in the public interest, and (2) in addition, those railroads as to which the Act fails to provide fair and equitable process. The Secondary Debtors do not fully qualify for exclusion under (1), and it is therefore necessary to determine whether they should be excluded under (2).

As to whether it is constitutionally permissible to require the Secondary Debtors to take stock in payment for their rail properties, the issues are substantially the same as in the Penn Central case. Of course, to the extent that a given Secondary Debtor can show present profitability, or even potential independent reorganizability, it might be necessary for the Special Court to arrive at higher values for particular properties than would be proper in the case of "incurables"; but this is a matter for the Special Court.

There are serious questions concerning the applicability of the Act to rail properties operated by Penn Central but leased from lessors which are not themselves in reorganization. While technically, such issues are not directly before this Court, it has been persuasively argued that the treatment of both Penn Central and the Secondary Debtors under the Act must take into account the treatment of Penn Central's non-bankrupt rail subsidiaries. For present purposes, it suffices to note that none of the arguments put forth by the government in any of these cases seems to establish any basis, other than the power of eminent domain, for acquiring rail properties of companies which are not themselves bankrupt.

I am inclined to agree with the contention of the Secondary Debtors that it would be unfair and inequitable

to apply different standards of valuation to conveyances of rail properties from non-bankrupt lessors, than in the case of the Secondary Debtors or those similarly situated. But there is nothing in §303(c)(1)(A) of the Act which would necessarily mandate the application of different standards.

A further problem of particular relevance to the Secondary Debtors arises in connection with the provisions of the Act dealing with the so-called "northeast corridor" from Boston to Washington. Virtually all of this property is owned by the Secondary Debtors and leased to the Penn Central. In response to contentions that Conrail would not be viable, the government, in the present proceedings, has taken the position that Conrail will be able to raise $500 million in cash by acquiring the northeast corridor properties and then selling them to Amtrak pursuant to §601(d) of the Act. While the public purpose of these provisions of the statute is quite clear, the constitutionality of that approach seems particularly dubious. Certainly, if Congress were to give Amtrak the power of eminent domain, Amtrak could properly acquire the corridor properties. But I find it difficult to accept the theory that it is constitutionally permissible for the government to achieve that result by means of the RRRA, without providing the present owners of the property with cash or its equivalent. This feature of the statute provides a further reason, in the case of the Secondary Debtors, for finding that the Act fails to provide fair and equitable process.

Appropriate findings and orders have been entered in each of the Secondary Debtors' proceedings, in conformity with the views expressed herein.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Identical Order in Each Secondary Debtor Proceeding)

ORDER NO.

AND NOW, this 1st day of July, 1974, in conformity with the requirements of §207(b) of the Regional Rail Reorganization Act of 1973, this Court FINDS and hereby ORDERS:

1. That the Regional Rail Reorganization Act of 1973 does not provide a process which would be fair and equitable to the estate of the Secondary Debtor.

2. That the reorganization of the estate of the Secondary Debtor shall not be carried out pursuant to the Regional Rail Reorganization Act of 1973.

3. That this Finding and Order shall be stayed pending the final determination of the Special Court pursuant to the Act.

/s/ John P. Fullam

DOCKET ENTRIES

in the

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

in

CONNECTICUT GENERAL INS. CORP., *ET AL.*

v.

UNITED STATES RAILWAY ASSN., *ET AL.*

No. 74-189

Date			Proceedings	Date of Judgment
1974				
1	Jan.	25	Complaint filed.	
	"	25	Summons exit.	
2	"	30	Plff's. application for three judge court, filed.	
3	Feb.	4	Order adding American National Bank & Trust Co. of Chicago, Irving Trust Co., Mellon Bank, N.A. and Wilmington Trust Co. as party plffs., filed.	
4	Feb.	4	Affidavit of service of Samuel Weller re: plff's. application for three judge court, filed.	
5	"	4	Affidavit of service of Virginia Gensel, filed.	
6	"	4	Affidavit of service of Samuel Weller upon U.S. Atty. of motion to add parties plff., filed.	
7	"	4	Affidavit of service of Jane Maley, upon defts., of motion to add parties plff., filed.	
8	"	7	Order designating Hon. Ruggero J. Aldisert and Hon. E. Mac Troutman to sit with Judge Fullam as members of the Court, etc., filed. C. Se entr. & cys. mailed 7/8/74	

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9	Feb.	8	Plff's. motion for preliminary injunction, with affidavit of Louis A. Craco, filed.
10	"	8	Memorandum of law in support of motion for preliminary injunction filed.
11	"	11	Order fixing hearing to show cause why an order should not issue for 2/20/74 at 11:00 a.m., filed. entr. & cys. mailed 2/12/74.
12	"	12	Affidavit of service of Eliz. Kayser re: Plff's. motion for preliminary inj., etc., filed.
13	"	15	Order dtd. 2/14/74 that Order fixing hearing for 2/20/74 re: Plff's. motion for preliminary injunction is VACATED and plff's. motion for prelim. inj. is DENIED, filed. entr. & cys. mailed 2/19/74.
14	"	15	Order that defts'. pleadings in response to complaint be filed on or before 3/4/74, filed. entr. & cys. mailed 2/19/74.
15	"	26	Summons returned "on 1/29/74 served Atty. Gen. by reg. mail and U.S. Atty" and "on 2/1/74 served all other defts." and filed.
16	Mar.	4	Answer of all defts., filed.
	"	4	CASE LISTED FOR TRIAL.
17	"	14	Order that counsel for each party of record shall furnish two copies of each document being filed to each of the three judges designated to hear this case, etc., filed. entr. & cys. mailed 3/15/74.
18	"	28	Transcript of pretrial conference 3-25-74, filed.
19	"	29	Order VACATING the assignment of this case to Hon. E. MacTroutman and assigning in his stead Hon. Alfred L. Luongo, filed. entr. & cys. mailed 4/2/74
20	Apr.	1	Deft's. advice concerning Sec. 1404(a) transfers, filed.
21	"	9	Motion of George P. Baker, et al. Trustees of Penn Central Trans. Co. to intervene as parties deft., memorandum in support and notice of motion, filed.
22	"	16	Plffs'. motion for summary judgment with notice of motion, filed.

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23	Apr.	16	Brief in support of plff's. motion for summary judgment, filed.
24	"	16	Affidavit of Louis A. Craco in support of motion for summary judgment with exhibits, filed.
25	"	16	Exhibit "F" to affidavit of Louis A. Craco, filed.
26	"	16	Motion of intervening defts'. for summary judgment, memorandum in support thereof, and certificate of service, filed.
27	"	18	Extracts of record of Penn Central Transportation Co., Debtor (Bkcy No. 70-347), filed.
28	"	18	Stipulation re facts set out solely for purposes of motion for summary judgment or partial summary judgment, etc., filed.
(21)	"	19	Order GRANTING motion of George P. Baker, et al. Trustees of Penn Central Trans. Co. for leave to intervene as parties deft., filed. entr. & cys. mailed 4/22/74
29	"	19	Answer of Penn Central Trustees, filed.
30	"	22	Order VACATING assignment of Judge Luongo to sit in this matter and assigning Hon. Louis C. Bechtle in his stead, filed. entr. & cys. mailed 4/23/74.
31	May	3	Order fixing hearing on motions for summary judgment for 6/3/74 and scheduling the filing of briefs and affidavits, filed. entr. & cys. mailed 5/6/74.
32	"	10	Stipulation re: Extract from record of Penn Central Bkcy. No. 70-347 and affidavit of Jerome E. Sharfman, filed.
33	"	17	Brief of Penn Central in opposition to plffs'. motion for summary judgment, filed.
34	"	17	Brief of defts'. in opposition to plffs'. motion for summary judgment and in partial opposition to intervening defts'. motion for summary judgment, filed.
35	"	20	Plffs'. response to intervening defts'. motion for summary judgment, filed.
36	"	24	Defts'. motion for summary judgment and notice of motion, filed.

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37	May	24	Affidavit of John W. Ingram, filed.
38	"	24	Plffs'. reply brief in support of their motion for summary judgment, filed.
39	"	28	Reply of Penn Central Trustees to "brief of defts. in opposition to plffs'. motion for summary judgment, etc." filed.
40	"	30	Joint documentary submission – extract from record of Penn Central Bkcy. – Vol. 1 items 1-35, filed.
41	"	30	Joint documentary submission – extract from record of Penn Central Bkcy. – Vol. 2 items 36 to 61, filed.
42	"	31	Legislative History of the Regional Rail Reorganization Act of 1973, filed.
43	Jun.	3	Amendment to affidavit of John W. Ingram, filed.
	"	3	Arg. re: Plff's. motion for summary judgment – C.A.V. Defts'. and intervening defts. motion for summary judgment – C.A.V.
44	"	6	Transcript of 6/3/74, filed.
45	"	25	Opinion and Order, ALDISERT, CJ; FULLAM, J. and BECHTLE, J., enjoining U.S. Railway System from certifying a Final System Plan to Special Court, etc., Enjoining defts. from taking any action to enforce provisions of Sec. 304(f) of the RRRA with respect to abandonment, etc.; enjoining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization under §77 of the Bankruptcy Act, entering Declaratory judgment that Sec. 303 of RRRA is null and void as contravening the Fifth Amendment, etc.; Sec. 304(f) of the RRRA is null and void as violative of the Fifth Amendment, etc.; that Sec. 207(b) of RRRA as requires reorganzation courts to dismiss pending bankruptcy proceedings as violative of Art. I Sec. 8 Clause 4 of the Constitution;

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45	Jun.	25	(continued) plffs. motions for partial summary judgment are granted in part and in all other respects denied; defts. motions for summary judgment are denied, filed. cys. to all parties 6/25/74 – entered 6/26/74
46	Jul.	2	Notice of appeal to the United States Supreme Court, filed.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

I.

JURISDICTION AND VENUE

1. Plaintiffs bring this action requesting this Court to declare that the Regional Rail Reorganization Act of 1973, Public Law 93-236 (the "Act"), is repugnant to the Constitution of the United States, to declare their rights with respect thereto, and to issue appropriate relief by way of permanent injunction or otherwise in connection therewith.

2. This Court has jurisdiction of this cause pursuant to Title 28 U.S.C. §§1331(a), 2201, 2202, 2282 and 2284. The amount in controversy exceeds $10,000, exclusive of interest and costs.

3. Venue with respect to this cause is properly laid in the Eastern District of Pennsylvania pursuant to Title 28 U.S.C. §1391(b) and (e). Defendants, other than the United States of America, are an agency of the United States and officers or employees of the United States or

of agencies thereof, acting in their respective official capacities and under color of legal authority pursuant to the Act. An actual controversy exists and plaintiffs' claims for relief herein arise, all within the Eastern District of Pennsylvania. Real property involved in the action is situated in the Eastern District of Pennsylvania.

4. This is a proper case for determination by a three-judge court pursuant to Title 28 U.S.C. §§ 2282 and 2284 since plaintiffs seek, among other things, a permanent injunction restraining the enforcement, operation and execution of the Act for repugnance to the Constitution of the United States.

II.
PARTIES

5. Plaintiffs are:

(a) CONNECTICUT GENERAL INSURANCE CORPORATION, which is a corporation duly organized and existing by virtue of the laws of the state of Connecticut, having its principal place of business in Hartford, Connecticut, and which owns mortgage bonds of Penn Central Transportation Company ("Penn Central") and of certain lessors of Penn Central's leased lines ("Lessors") in the aggregate principal amount of $31,025,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(b) CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, which is a corporation duly organized and existing by virute of the laws of the state of Connecticut, having its principal place of business in Hartford, Connecticut, and which owns mortgage bonds of Penn Central

and of certain Lessors in the aggregate principal amount of $9,985,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(c) THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which owns mortgage bonds of Penn Central and of certain Lessors in the aggregate principal amount of $147,509,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(d) METROPOLITAN LIFE INSURANCE COMPANY, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which owns mortgage bonds of Penn Central and of certain Lessors in the aggregate principal amount of $69,687,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(e) THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, which is a corporation duly organized and existing by virtue of the laws of the state of New Jersey, having its principal place of business in Newark, New Jersey, and which owns mortgage bonds of Penn Central and of certain Lessors in the aggregate principal amount of $35,395,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(f) THE BANK OF NEW YORK, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which is, and sues

herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(g) BANKERS TRUST COMPANY, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(h) THE FIDELITY BANK, which is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of a Lessor were issued or secured;

(i) THE FIRST PENNSYLVANIA BANKING AND TRUST COMPANY, which is a coproration duly organized and existing by virtue of the laws of the state of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(j) GIRARD TRUST BANK, which is a corporation duly organized and existing by virtue of the laws of

the state of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(k) NATIONAL COMMERCIAL BANK AND TRUST COMPANY, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in Albany, New York, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured; and

(l) UNITED STATES TRUST COMPANY OF NEW YORK, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured.

The aggregate principal amount of bonds issued under or secured by the indentures, mortgages, and deeds of trust of which the parties plaintiff listed above in subparagraphs (f) through (l) are corporate trustees or successor corporate trustees, including certain of the bonds held by the parties plaintiff listed above in subparagraphs (a) through (e), is in excess of $800,000,000.

6. Defendants are:

(a) the UNITED STATES RAILWAY ASSOCIATION ("Association"), which is a government corporation of the District of Columbia established by virtue of § 201 of the Act in which, by virtue of sundry provisions of the Act, the United States has a proprietary interest;

(b) CLAUDE S. BRINEGAR, who is Secretary of Transportation of the United States, and, pursuant to § 201 of the Act, one of the three individuals designated as incorporators of the Association and a member of the acting Board of Directors of the Association, and who is herein sued in each of those respective capacities;

(c) GEORGE M. STAFFORD, who is Chariman of the Interstate Commerce Commission, and, pursuant to § 201 of the Act, one of the three individuals designated as incorporators of the Association and a member of the acting Board of Directors of the Association, and who is herein sued in each of those respective capacities;

(d) GEORGE P. SHULTZ, who is Secretary of the Treasury of the United States, and, pursuant to § 201 of the Act, one of the three individuals designated as incorporators of the Association and a member of the acting Board of Directors of the Association, and who is herein sued in each of those respective capacities; and

(e) the UNITED STATES OF AMERICA.

III.

CLAIM FOR RELIEF

A. Constitutional Infirmities of the Act.

7. All as more fully set forth at length hereinafter, the Act, and various provisions thereof, are repugnant

to the Constitution of the United States on their face, and as applied to plaintiffs, deny and abridge their constitutional rights in the following respects, among others:

(a) The Act and various provisions thereof require, by force of law, the taking of plaintiffs' property for public use without payment of just compensation in lawful specie of the United States, in violation of the Fifth Amendment to the Constitution of the United States;

(b) The Act and various provisions thereof require, by force of law, the taking of plaintiffs' property for public use without the payment of just compensation or the payment of any fair and equitable equivalent of the property taken, in violation of the Fifth Amendment to the Constitution of the United States;

(c) The Act requires the continued operation of certain rail properties of Penn Central and the incurring of continued losses therefrom after there has ceased to be any possibility of halting such losses from the operation of rail properties, or of its reorganization on an income basis and, by force of law, deprives the plaintiffs of their rights presently to foreclose or otherwise enforce their liens in accordance with their respective terms, all without payment of any just compensation, in violation of the Fifth Amendment to the Constitution of the United States;

(d) The procedures required by the Act including but not limited to those by which the rights of plaintiffs and others similarly situated are to be determined, those by which the public interest is to be determined in various respects called for by the Act, and those pertaining to the transfer or conveyance of rail properties deny to plaintiffs due process of law guaranteed to them by the

Fifth Amendment to the Constitution of the United States;

(e) Insofar as the Act is applicable only to the "region" as therein defined, it does not constitute a lawful exercise of the power of Congress to make uniform laws on the subject of bankruptcies throughout the United States under Article I, Section 8 of the Constitution of the United States; and

(f) Insofar as various and sundry of its provisions separately and together effect a confiscation of the property rights of plaintiffs, ostensibly for the purpose of achieving public objectives, the Act is not a lawful exercise of the power of Congress to regulate interstate commerce under Article I, Section 8 of the Constitution of the United States.

8. By reason of the immediate and continuing operation of the Act, and by virtue of the acts taken and required to be taken by defendants pursuant to the Act which themselves and in conjunction with the further measures contemplated by the Act will irreparably injure plaintiffs, all as more fully described hereinafter, plaintiffs, Penn Central and Lessors are now subject to a process which authorizes and compels the taking of plaintiffs' properties and other abridgements of plaintiffs' constitutional rights. Plaintiffs have no other remedy at law or otherwise by which they can assert their rights, and by reason of all of the foregoing there exists an immediate and concrete case and controversy between plaintiffs and defendants for which the only full and adequate resolution is a judgment of this Court granting their relief herein sought.

B. The Operation of the Act.

9. On or about June 21, 1971, Penn Central, and subsequent thereto certain Lessors, filed petitions for reorganization pursuant to Section 77 of the Bankruptcy Act, Title 11 U.S.C. § 205, in the Eastern District of Pennsylvania, Docket No. 70-347.

10. Penn Central is a "railroad" as defined in Title 49 U.S.C. § 1(3) and in Section 102(11) of the Act, a "railroad in reorganization" as defined in Section 102(12) of the Act, and a railroad doing business in the "region" as defined in Section 102(13) of the Act.

11. Lessors own (and in some instances lease from others, or control) "rail properties", as such term is defined in Section 102(10) of the Act, in the "region" which are leased, operated, or controlled by Penn Central.

12. Penn Central owns, leases and operates approximately 19,850 road miles of railroad out of the total of approximately 27,350 road miles of railroad owned, leased and operated by "railroads in reorganization" in the "region", or approximately 73% thereof.

13. Defendants Brinegar, Stafford and Shultz pursuant to the terms of the Act are required to take such action as may be necessary to incorporate the Association and, collectively thereafter, to act as the interim Board of Directors of the Association in which capacity they are required by the Act to cause actions complained of herein to be taken by the Association.

14. Pursuant to Sections 207(c) and/or 208(b) of the Act, the Association will adopt a "final system plan", as such term is defined in Section 102(6) of the Act, which

plan is to be formulated in such a way as to provide for the "region" adequate and efficient rail service required to meet therein the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, states and their political subdivisions, and consumers, all in furtherance of the declaration of policy set out in Section 101(a)(3) of the Act.

15. The Act does not apply to "railroads in reorganization" other than those in the "region".

16. Only "railroads in reorganization" which are or become such prior to the adoption of a final system plan which is not thereafter disapproved by Congress under Section 208 of the Act are subject to the provisions of the Act.

17. Pursuant to Section 206(c) of the Act, the final system plan will designate "rail properties" of "railroads in reorganization" and of railroads leased, operated or controlled by any "railroad in reorganization" in the "region", which shall be transferred to the Consolidated Rail Corporation ("Corporation") to be established pursuant to Section 301 of the Act and "rail properties" which shall be offered for sale to a "profitable railroad" as such term is defined in Section 102(9) of the Act.

18. By reason of the facts alleged in Paragraphs 12 and 14 through 17 hereof, the final system plan will necessarily designate for transfer or sale rail properties of Penn Central and Lessors.

19. Pursuant to Section 303(b) of the Act, rail properties of Penn Central and Lessors will be transferred or conveyed as designated in the final system plan, free and clear of all liens and encumbrances of plaintiffs, and the liens

of plaintiffs will be thereby extinguished and taken from them.

20. Under the provisions of the Act, the final system plan will be formulated and adopted, and rail properties of Penn Central and Lessors will be designated therein as alleged in Paragraph 18 hereof, and transferred or conveyed pursuant thereto, as alleged in Paragraph 19 hereof, without approval or consent, express or implied, of plaintiffs or approval, consent, option or choice of any court having jurisdiction or power to take any such action with respect to such properties.

21. By reason of the facts alleged in Paragraph 20 hereof, plaintiffs will be deprived of their property without plaintiffs' having any choice or control with respect to the disposition thereof.

22. Pursuant to Section 206(d)(1) of the Act, transfers and conveyances of rail properties of Penn Central and of Lessors upon which plaintiffs have liens will be made to the Corporation in exchange for common stock and other securities of the Corporation (including obligations of the Association), other undefined benefits, and any judgment against the Corporation which may be rendered pursuant to Section 303(c)(2)(C) of the Act.

23. The Act makes no provision for just compensation for the plaintiffs' property taken pursuant to its terms nor for any fair and equitable equivalent of such property for, among others, the following reasons:

(a) The initially issued common stock of the Corporation substituted in the estates of the railroads in reorganization in consideration for rail properties transferred or conveyed to the Corporation pursuant to Section 303(b)

of the Act is of uncertain, if any, value in that the capital structure and the prospective earnings, if any, of the Corporation are uncertain and highly speculative, no external method is provided for assuring value in such common stock, voting and management selection attributes of such common stock will be denied to plaintiffs and other owners of such common stock, pursuant to Section 301 (e) of the Act, without their approval or consent, and no method is provided by the Act for the determination of any such value prior to the transfer and conveyance of plaintiffs' properties pursuant to the terms of the Act;

(b) The "other benefits" accruing to railroads in reorganization referred to in Section 206(d)(1) of the Act, if any, are undefined as to the nature and scope and availability to the plaintiffs, their value, if any, is uncertain and speculative, and no method is provided by the Act for the determination of such value prior to the transfer and conveyance of plaintiffs' properties pursuant to the terms of the Act;

(c) The maximum aggregate amount of Association obligations which may be issued to the trustees of all railroads in reorganization pursuant to Section 206(d)(1) of the Act is limited to $500,000,000, which sum is substantially less than the value of the liens on the rail properties of, and is also less than the aggregate principal amount of the secured indebtedness of, Penn Central and Lessors alone; and

(d) The deficiency judgment provided for by Section 303(c)(2)(C) of the Act will be illusory, valueless, and not constitute compensaton to plaintiffs, Penn Central or Lessors.

24. Pursuant to Section 207(b) of the Act, Penn Central and Lessors will be subject to the procedures of the

Act unless the United States District Court having jurisdiction of the property of Penn Central and of certain Lessors in the reorganization proceedings referred to in Paragraph 9 hereof ("Reorganization Court") finds that Penn Central and said Lessors are reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by application of the provisions of the Act, or that the Act does not provide a process which would be fair and equitable to the estates of Penn Central and said Lessors.

25. The Reorganization Court is required to make the determinations referred to in Paragraph 24 above at a time when the final system plan will not have been adopted and, therefore, said Court cannot know, and the record before said Court cannot show, what properties of Penn Central and Lessors will be transferred pursuant to the final system plan or what consideration will be received in exchange therefor.

26. Any finding which may be made pursuant to Section 207(b) of the Act, other than a finding with respect to the reorganizability on an income basis of Penn Central and Lessors, will be made without a meaningful hearing being afforded to plaintiffs and without an adequate record upon which the Reorganization Court can render an informed independent judgment.

27. Pursuant to Sections 207(b), 209(a) and 303(d) of the Act, plaintiffs' rights to judicial review are limited, conditioned and denied.

28. Penn Central is operating its rail properties at heavy losses, and if required to continue such operations, such losses will continue and be unavoidable. Penn Central is

not reorganizable on an income basis under Section 77 of the Bankruptcy Act.

29. Pursuant to Section 207(b) of the Act, the power of the Reorganization Court to dismiss the reorganization proceedings under Section 77(g) of the Bankruptcy Act upon a finding that Penn Central is not reorganizable under said Section 77 is eliminated.

30. By reason of the facts alleged in Paragraph 29 hereof, plaintiffs' right to foreclose their liens or otherwise enforce their rights as creditors is eliminated.

31. As of the date hereof and pursuant to Section 304(f) of the Act, Penn Central and the certain Lessors referred to in Paragraph 9 hereof may not discontinue service or abandon any line of railroad unless authorized by the Association and unless no state, local or regional transporation authority objects thereto.

32. The Act contains no provision or authorization for payment of any compensation to Penn Central, to Lessors or to plaintiffs for the forced continuation of unprofitable rail services.

IV.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court make application for the convening of a three-judge district court and that said three-judge court hear this action, and upon such hearing to:

1. Order, adjudge, decree and declare that (a) the Regional Rail Reorganization Act of 1973 is repugnant to the Constitution of the United States, and (b) the duties

imposed upon defendants by the Regional Rail Reorganization Act of 1973 are not authorized or permitted by the Constitution of the United States and that the discharge of such duties will violate plaintiffs' rights under the Constitution of the United States; and further

2. Permanently enjoin and restrain defendants, their agents and assistants from the use, operation, enforcement, execution and application of the Act in any and all respects in which the same may be found to be repugnant to the Constitution of the United States; and further

3. Grant such other and further relief as to the court may seem just and proper, together with the costs and disbursements of this action.

Dated: January 25, 1974

/s/ Louis A. Craco
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

AND NOW, this 4th day of February, 1974, upon consideration of the annexed Motion to Add Parties Plaintiff,

IT IS ORDERED that the following are added as parties Plaintiff in the above captioned action, in their representative capacities as trustees under certain indentures, mortgages or deeds of trust, American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company, with the same force and effect as though they had been named in the original Complaint herein at the time of the commencement of this action, and it is further

ORDERED that as and for a cause of action in behalf of the said Plaintiffs, American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company, that all of the allegations contained in the original Complaint in behalf of the Plaintiffs Connecticut General Insurance Corporation, Connecticut Mutual Life Insurance Company, The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, The Prudential Insurance Company of America, and, in their respective capacities as trustees under certain indentures, mortgages or deeds of trust, The Bank of New York, Bankers Trust Company, The Fidelity Bank, The First Pennsylvania Banking and Trust Company, Girard Trust Bank, National Commercial Bank and Trust Company and United States Trust Company of New York, be set forth at length as that of

Plaintiffs American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company, and it is further

ORDERED that the names of American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company in their representative capacities as trustees under certain indentures, mortgages or deeds of trust, be added to the Complaint herein and that the Clerk of this Court is hereby ordered to mark his records in the case accordingly.

/s/ John P. Fullam
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ANSWER OF ALL DEFENDANTS

Defendants for their Answer to the Complaint answer the numbered paragraphs of the Complaint as follows:

1. Defendants admit that the allegations contained in paragraph 1 are a correct generalized description of the contents of the Complaint.

2. The allegations contained in paragraph 2 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants admit that the amount in controversy, if any, exceeds $10,000 exclusive of interest and costs.

3. The allegations contained in paragraph 3 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that an actual controversy exists, that any of plaintiffs' claims for relief or causes of action, if any, arise within the Eastern District of Pennsylvania, or that any real property is involved in the action.

4. Defendants deny each and every allegation contained in paragraph 4, except that defendants admit that plaintiffs seek, among other things, a permanent injunction restraining the enforcement, operation and execution of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236 (the Act), for repugnance to the Constitution of the United States.

5. Defendants:

(a) admit that Connecticut General Insurance Corporation is a corporation duly organized and existing by virtue of the laws of the State of Connecticut, having its principal place of business in Hartford, Connecticut. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(a).

(b) admit that Connecticut Mutual Life Insurance Company is a corporation duly organized and existing by virtue of the laws of the State of Connecticut, having its principal place of business in Hartford, Connecticut. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(b).

(c) admit that The Equitable Life Assurance Society of the United States is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(c).

(d) admit that Metropolitan Life Insurance Company is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(d).

(e) admit that The Prudential Insurance Company of America is a corporation duly organized and existing

by virtue of the laws of the State of New Jersey, having its principal place of business in Newark, New Jersey. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(e).

(f) admit that The Bank of New York is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(f).

(g) admit that Bankers Trust Company is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(g).

(h) admit that The Fidelity Bank is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(h).

(i) admit that The First Pennsylvania Banking and Trust Company is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(i).

(j) admit that Girard Trust Bank is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of pargraph 5(j).

(k) admit that National Commercial Bank and Trust Company is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in Albany, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(k).

(l) admit that United States Trust Company of New York is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(l).

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last unlettered paragraph of paragraph 5.

6. Defendants:

(a) admit that the United States Railway Association (the Association) is a government corporation of the District of Columbia established by virtue of Section 201 of the Act. The remaining allegations contained in paragraph 6(a) are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

(b) admit the allegations contained in paragraph 6(b).

(c) admit the allegations contained in paragraph 6(c).

(d) admit the allegations contained in paragraph 6(d).

(e) admit the allegations contained in paragraph 6(e).

7. The allegations contained in paragraph 7 are conclusions of law which do not require answer and are accordingly neither admitted nor denied. Moreover, said paragraph purports to be a summary of allegations elsewhere in the Complaint, each of which is pleaded to in this Answer and therefore does not require separate and redundant response.

8. The allegations contained in the first sentence of paragraph 8 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that the acts and measures complained of will irreparably injure plaintiffs. The allegations contained in the second sentence of paragraph 8 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that plaintiffs have no other remedy at law or otherwise by which they can assert their rights, if any, or that there exists an immediate or concrete case or controversy between plaintiffs and defendants.

9. Defendants admit the allegations contained in paragraph 9, except that defendants deny that a petition for the reorganization of each Lessor is pending in the Eastern District of Pennsylvania in Docket No. 70-347.

10. Defendants admit the allegations contained in paragraph 10.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Defendants admit the allegations contained in paragraph 12.

13. The allegations contained in paragraph 13 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that defendants Brinegar, Stafford and Shultz, or any of them, are required by the Act to cause to be taken by the Association any of the actions complained of in the Complaint.

14. The allegations contained in paragraph 14 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

15. The allegation contained in paragraph 15 is a conclusion of law which does not require answer and is accordingly neither admitted nor denied.

16. The allegations contained in paragraph 16 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

17. The allegations contained in paragraph 17 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

18. Defendants deny each and every allegation contained in paragraph 18.

19. The allegations contained in paragraph 19 are conclusions of law which do not require answer and are

accordingly neither admitted nor denied, except that defendants deny that it is possible to ascertain at this time which, if any, rail properties of Penn Central Transportation Company (the Penn Central) or Lessors will be transferred or conveyed pursuant to the final system plan.

20. The allegations contained in paragraph 20 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that (i) the final system plan will necessarily designate rail properties of Penn Central or Lessors, (ii) rail properties of Penn Central or Lessors will necessarily be transferred or conveyed pursuant thereto, or (iii) the transfer or conveyance, if any, of rail properties of Penn Central or Lessors pursuant to the final system plan will be done without the approval, consent, option or choice of any court having jurisdiction or power to take any such action with respect to any such properties.

21. Defendants deny the allegation in paragraph 21 that plaintiffs will be deprived of their property, and further deny that, if any such deprivation should occur, it would be without plaintiffs having any choice or control with respect to the disposition thereof in view of the facts, among others, that the Trustees in Bankruptcy of Penn Central or Lessors acting for the benefit of plaintiffs could challenge or oppose the inclusion of their rail properties in the reorganization process established under the Act in judicial or administrative proceedings before one or more of the following: The United States District Court having jurisdiction over the reorganization proceeding of Penn Central, the Special Court established pursuant to the Act, the Supreme Court of the United States, the Association, the Rail Services Planning Office established pursuant to the Act, and the Interstate Commerce Commission. Further, some of plaintiffs are parties to the

reorganization proceedings of Penn Central or Lessors, and are being and will be afforded right to hearing in such proceedings.

22. The allegations contained in paragraph 22 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that any rail property of Penn Central or of any Lessor upon which plaintiffs have liens will necessarily be transferred or conveyed to the Consolidated Rail Corporation; and further deny that it is possible to determine at this stage the nature or value of the consideration that will be transferred to plaintiffs in exchange for any such rail property.

23. Defendants deny:

(a) that at the time when common stock of the Consolidated Rail Corporation is exchanged for rail properties, as set forth in the Act, such stock will be of uncertain value, and that the capital structure and prospective earnings of the Consolidated Rail Corporation will be either uncertain or highly speculative. Defendants further deny that the voting and management selection attributes of such common stock will necessarily be denied to plaintiffs or to any other owners of such common stock pursuant to any provisions of the Act.

(b) that at the time when "other benefits" accrue to any railroads in reorganization referred to in § 206(d)(1) of the Act those "other benefits" will be undefined as to nature, scope or availability to the plaintiffs, and further deny that the value of such "other benefits" will be uncertain or speculative.

(c) that the sum of $500,000,000 is substantially less than the value of the liens on the rail properties of

Penn Central and Lessors. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the sum of $500,000,000 is less than the aggregate principal amount of the secured indebtedness of Penn Central and Lessors.

(d) that a deficiency judgment will necessarily be required to be entered in favor of Penn Central or Lessors, and further deny that any such judgment as may be entered will be illusory or valueless or will not constitute compensation to plaintiffs.

Each and every other allegation contained in paragraph 23 is a conclusion of law which does not require answer, and all such allegations are accordingly neither admitted nor denied.

24. The allegations contained in paragraph 24 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

25. The allegations contained in paragraph 25 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

26. Defendants deny each and every allegation contained in paragraph 26.

27. The allegations contained in paragraph 27 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28.

29. The allegations contained in paragraph 29 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

30. Defendants deny each and every allegation contained in paragraph 30 to the extent that it is an allegation of fact. To the extent that any allegation in paragraph 30 is not an allegation of fact, it is a conclusion of law which does not require answer and is accordingly neither admitted nor denied.

31. The allegations contained in paragraph 31 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

32. The allegations contained in paragraph 32 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Venue as alleged under 28 U.S.C. § 1391(b) and (e) is improper. The action is brought in a judicial district in which none of the claims or causes of action, if any exist, arose; and no real property is involved in the action.

THIRD DEFENSE

This Court lacks jurisdiction over the subject matter since this is a judicial proceeding with respect to the final system plan and is required by Section 209(b) of the Act to be consolidated in a single, three-judge district court of the United States (which the Act denominates as the "special court" and which is hereinafter referred to as the

Special Court) whose members are to be designated by the Judicial Panel on Multidistrict Litigation.

FOURTH DEFENSE

This Court should not take jurisdiction of the action, since primary jurisdiction is vested in and comity requires deference to the single-judge United States District Court for the Eastern District of Pennsylvania which has jurisdiction over Penn Central and certain of its Lessors in reorganization and which is required by Section 207(b) of the Act to make findings as to (1) whether the public interest would be better served by a reorganization on an income basis under Section 77 of the Bankruptcy Act (11 U.S.C. § 205) rather than by a reorganization under the Act (which finding could result in the discontinuance of any proceedings under the Act concerning the rail properties of Penn Central or Lessors) and (2) whether the Act provides a process which would be fair and equitable to the estate of Penn Central (an inquiry which would essentially duplicate the inquiry which the Court is asked to make herein).

FIFTH DEFENSE

The action is not yet ripe for adjudication. It is therefore premature and presents no actual case or controversy. Any determination as to the allegations concerning the constitutionality of the Act contained in the Complaint cannot and in any event should not be made except in one or more of certain proceedings required by the Act and by Section 77 of the Bankruptcy Act, including (a) the findings, decisions and orders of reorganization courts and the Special Court under Section 207(b) of the Act, (b) the preparation, adoption and review of a final system plan under Section 207(c) and (d) of the Act, (c) the approval and coming into effect of such plan pursuant

to Section 208 of the Act, (d) the findings, determinations and orders of the Special Court under Section 303(c) of the Act relating to the fairness and equitableness of the transfers and conveyances of rail properties pursuant to the plan, and (e) the division among the parties to the reorganization of the transferor railroads of the securities, other benefits and judgments awarded to the estates of those railroads.

SIXTH DEFENSE

Plaintiffs are not entitled to declaratory or injunctive relief because they have not suffered and are not threatened with any irreparable injury, and plaintiffs have adequate remedies at law.

WHEREFORE, having fully answered, defendants pray that the Complaint be dismissed and that they recover their costs and attorneys' fees, and that the Court grant such other relief as may be proper.

Respectfully submitted,

March 4, 1974

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Acting Assistant Attorney General

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United States Attorney

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/s/ William R. Perlik
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION FOR LEAVE TO INTERVENE

George P. Baker, Robert W. Blanchette, and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, and not individually, Six Penn Center Plaza, Philadelphia, Pa. 19104, 215-594-2139, respectfully move for leave to intervene as parties defendant in this proceeding, and to file the attached Answer.

Applicants' grounds for their motion are fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

/s/ John B. Rossi, Jr.
John B. Rossi, Jr.
John F. DePodesta
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Philadelphia, Penna. 19104
215-594-2271

Charles A. Horsky
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888 Sixteenth St., N.W.
Washington, D.C. 20006
202-293-3300

Attorneys for Intervenors

Dated: April 3, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ANSWER OF THE PENN CENTRAL TRUSTEES

1. Defendants George P. Baker, Robert W. Blanchette, and Richard C. Bond (the Trustees) are the Trustees of the property of Penn Central Transportation Company, Debtor, (Penn Central) a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act in proceedings pending in the United States District Court for the Eastern District of Pennsylvania. The Trustees' principal office is in Philadelphia, Pennsylvania.

2. Penn Central is a Class 1 railroad and the Trustees own, lease, operate or control rail lines located throughout the region defined in the Regional Rail Reorganization Act of 1973 (the Act). As such, Penn Central and the Trustees are subject to procedures of the Act.

3. As their answer to the complaint herein the Trustees allege as follows:

(a) Admit the allegations of paragraph 1 through 6, except lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 which set forth individual ownership and aggregate amount of bonds;

(b) With respect to subsections (a) through (c) of paragraph 7, admit that the Act has resulted and may result in takings of the Trustees' property and may deprive plaintiffs of foreclosure rights but deny that such takings and deprivations are in violation of

the Fifth Amendment to the Constitution of the United States because of the right of the Trustees to obtain a judgment against the United States in the Court of Claims pursuant to the Tucker Act (Title 28 U.S.C. Section 1491) for just compensation for any and all such takings and deprivations. Because of the availability of the Tucker Act remedy, the Trustees deny the allegations of subparagraphs (d) and (f) of paragraph 7. The Trustees deny the allegations of subparagraph (e) of paragraph 7.

(c) Admit that the Act provides a procedure which may result in a taking of property and admit that a case and controversy exists but deny the remaining allegations of paragraph 8 because of the availability of a Tucker Act remedy;

(d) Admit the allegations of paragraph 9 except to allege that the Penn Central's petition for reorganization was in fact filed and approved on June 21, 1970;

(e) Admit that Penn Central is a "common carrier" as defined in Title 49 U.S.C. § 1(3) and therefore a "railroad" as defined in Section 102(11) of the Act. By further answer, the Trustees allege that at this time Penn Central is "a railroad in reorganization" only for the purposes of Section 207(b) of the Act, and may as a result of the determinations to be made pursuant to that Section become "a railroad in reorganization" as defined in Section 102(12) of the Act;

(f) Admit the allegations of paragraphs 11 through 20 but refer to the Act itself for the true and correct contents thereof;

(g) Admit the allegations of paragraphs 21 through 23 and in further answer allege that the Act does not

impair or preclude the Trustees' right to obtain a money judgment pursuant to the Tucker Act;

(h) Admit the allegations of paragraphs 24 and 25;

(i) Deny the allegations of paragraph 26;

(j) Admit that plaintiffs' rights to judicial review have been limited or conditioned by the Act but deny the further allegation in paragraph 27;

(k) Admit the allegations of paragraph 28;

(l) Deny the allegations of paragraphs 29 and 30;

(m) As to paragraph 31, admit that as of the date hereof the Trustees may not discontinue service or abandon any line of railroad unless authorized by the Association and unless no state, local or regional transportation authority *reasonably* objects thereto;

(n) Admit the allegations of paragraph 32 and further answer that the Act does not impair or preclude the Trustees' entitlement to a money judgment pursuant to the Tucker Act for the takings resulting from or occasioned by the forced continuation of rail services.

4. As a further answer the Trustees assert that they are entitled to bring an action in the Court of Claims pursuant to the Tucker Act for a money judgment against the United States for any inadequacy in the amount or kind of compensation awarded pursuant to the procedures of the Act for the takings of property pursuant to or occasioned by the Act. The entitlement of the Trustees to obtain pursuant to the Tucker Act any money judgment that may be necessary to provide just compensation is not impaired or precluded by any provision of the Act and the availability of the Tucker Act remedy assures that just

compensation will be paid for all properties, assets, rights and interests subjected to either a temporary or permanent taking by the Act.

Prayer for Relief

WHEREFORE, the Trustees pray that the Court enter an order dismissing the complaint herein and finding the Act to be valid because the Trustees are entitled to obtain any money judgment that may be necessary to provide just compensation for the takings pursuant to or occasioned by the Act by means of an action against the United States in the Court of Claims pursuant to the Tucker Act, and that the Act does not impair or preclude the Trustees' exercise of that right.

Respectfully submitted,

/s/ John B. Rossi, Jr.
John B. Rossi, Jr.
John F. DePodesta
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19104
215-594-2271

Charles A. Horsky
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888 Sixteenth Street, N.W.
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202–293-3300

Attorneys for Intervenors

Dated: April 3, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

On consideration of the motion of George P. Baker, Robert W. Blanchette, and Richard C. Bond, as Trustees of the property of Penn Central Transporation Company, Debtor, for leave to intervene, it is

ORDERED that the aforesaid motion for leave to intervene is granted.

/s/ John P. Fullam
J.

Dated: April 19, 1974

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

It is hereby stipulated and agreed by and between the attorneys for the undersigned parties hereto that the following extracts from the Record of *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347, Eastern District of Pennsylvania) are hereby made a part of the Record in the above-captioned matter with the same force and effect as if the same had been received in evidence by the court in this matter in the first instance.

A – Extracts from Bky. 70-347

1. Petition for Reorganization, Doc. No. 1

2. Reports of Trustees on Reorganization Planning, dated February 15, 1972, April 1, 1972, July 1, 1972, October 1, 1972, January 1, 1973, February 1, 1973, April 3, 1974, Docs. No. 2637, 3033, 3827, 4428, 4911, 5043, 7304

3. Petition for leave to file a step of a Plan of Reorganization relating to abandonments, and for interim relief, Doc. No. 5152

4. Petition for leave to file a step of a Plan of Reorganization relating to passenger service and for interim relief, Doc. No. 5151

5. Trustees' Plan of Reorganization dated July 2, 1973, Doc. No. 5927.

6. Financial Statements:
   Docs. No.: 218, 256, 373, 428, 431, 630, 786, 1062, 1309, 1754, 2158, 1085, 1137, 1309,

1085, 1210, 1309, 1272, 1419, 1432, 1439, 1552, 1551, 1742, 1751, 1867, 2005, 2006, 2113, 2158, 2225, 2366, 2438, 2483, 3415, 3052, 3311, 3237, 3513, 3514, 3779, 3780, 3966, 4019, 4109, 4262, 4214, 4263, 4439, 4371, 4541, 4542, 4674, 4721, 4861, 4891, 5037, 5224, 5265, 5291, 5372, 5449, 5539, 5571, 5741, 5742, 5898, 5899, 5900, 6021, 6022, 6127, 6128, 6278, 6277, 6390, 6391, 6597, 6632, 6825, 6826, 6985 and 6986.

7. Petition of Trustees: Docs. No.: 4696, 4798, 740, 1793, 1794, 4886 and 5247, and Orders with respect thereto: Nos. 1073, 1103, 1087, 1088 and 1156.

8. Memorandum and Order No. 1137, Doc. No. 5298, and the hearings pursuant thereto.

9. Order No. 1321, Record of the Proceedings had on October 12, 1973 pursuant to said Order, including Statements of Position.

10. Petition of the Trustees for approval of the terms of and authority to enter into an Agreement with the Secretary of the Department of Transportation with respect to certain equipment obligations (Doc. No. 7024), and supporting affidavits and exhibits thereto and the transcript of proceedings in respect thereof, held on February 26, 1974.

11. Order No. 1426, Record of the Proceedings had on March 25, 1974 pursuant to said Order, including all affidavits, exhibits and testimony of witnesses.

12. Order No. 848, Record of the Proceedings had pursuant to said Order, including all affidavits, exhibits and testimony of witnesses.

13. Orders No. 1172, 1404 and 1422, Record of the Proceedings had pursuant to said Orders, including all affidavits, exhibits and testimony of witnesses.

14. Petition of Trustees: Docs. No. 2870-2874, and Orders 605 and 649, Docs. No. 2875 and 3131, Record of the Proceedings had pursuant to said Orders, including all affidavits, exhibits and testimony of witnesses.

15. Reports of trustees on Status of Reorganization Planning, dated March 22, 1971 and September 17, 1971, Docs. No. 964, 1828.

B – The Record in ICC Finance Docket 26241

1. Docs. No. 6420-6429

2. The ICC Report, September 28, 1973

It is further stipulated and agreed that the inclusion in the Record of this action of the above-specified extracts is without prejudice to the right of any party to make any other proof in the above-captioned action including proof of facts impeaching any matters asserted in the above-specified extracts and is without prejudice to the right of the parties to stipulate to the inclusion of such further extracts as may from time to time seem appropriate.

Dated: April 15, 1974
Philadelphia, Pennsylvania

/s/ Thomas L. Bryan
Attorney for Plaintiffs

/s/ William R. Perlik
Attorney for Defendant
United States Railway Association

/s/ James F. Dausch
Attorney for Defendants
Brinegar, Shultz, Stafford and
United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LOUIS A. CRACO, being duly sworn, deposes and says:

1. I am an attorney at law, admitted to the bar of this Court *pro hac vice*, and I am a member of the firm of Willkie Farr & Gallagher, attorneys for the plaintiffs herein. I make this affidavit in support of the motion of said plaintiffs for summary judgment pursuant to F.R. Civ. P. 56 declaring the Regional Rail Reorganization Act of 1973 to be unconstitutional and granting said plaintiffs such other and further relief as may be proper under the circumstances. Except where otherwise indicated, I make this affidavit with respect to the matters herein set out on personal knowledge.

2. The parties have stipulated certain facts as true for purposes for the present motion. The original of that stipulation of facts will be separately filed with the Court. A true and correct copy of the stipulation of facts is annexed hereto for the convenience of the Court, and marked Exhibit A.

3. The parties have entered into a stipulation by the terms of which certain extracts from the record lodged in the United States District Court for the Eastern District of Pennsylvania in the matter of *Penn Central Transportation Company, Debtor* (Bky. No. 70-347) are made a part of the record before the Court in this action. The

original of that stipulation with respect to the record will be separately filed with the Court. A true and correct copy of the said stipulation is annexed hereto for the convenience of the Court, and marked Exhibit B.

4. The plaintiffs respectfully incorporate by reference the stipulated facts (Exhibit A) and the matters in evidence referred to in the stipulation with respect to the record (Exhibit B) as part of the record upon this motion.

5. On February 1, 1974, defendant Brinegar, in his capacity as the Secretary of Transportation of the United States of America, published a report entitled, "Rail Service in the Midwest and Northeast Region" which had been prepared under his supervision and was submitted in accordance with Section 204 of the Regional Rail Reorganization Act of 1973. Said report consists of Volume 1, Volume 2 (Part 1) and Volume 2 (Part 2). Thereafter on March 1, 1974, a document entitled, "Volume 2, Supplement to Local Rail Service Zone Reports", purporting to contain, in addition to certain matters with respect to the State of Wisconsin, a "table of additions and corrections," was issued by the Secretary of Transportation. Plaintiffs are causing a copy of the aforesaid documents to be deposited with the clerk of the Court simultaneously herewith and request the Court to deem said report in its entirety to be marked Exhibit F upon this motion.

6. Annexed hereto is an affidavit of C. C. Shannon, President of Wyer, Dick & Company, Transportation and Traffic Consultants, with an exhibit both with respect to the report referred to in paragraph 5 hereof. (Exhibit C)

7. Upon information and belief, on or about September 11, 1973 defendant Brinegar executed and sent a letter to Hon. John Jarman, Chairman, Subcommittee on Transportation and Aeronautics of the Interstate and Foreign Commerce Committee of the House of Representatives,

containing comments on the Subcommittee Print of H.R. 9142 (Aug. 2, 1973). A true and correct copy of said letter is annexed hereto and marked Exhibit D.

8. Upon information and belief, on or about November 14, 1973 defendant Brinegar executed and sent a letter to Hon. Warren G. Magnuson and Hon. Norris Cotton, the Chairman and Ranking Minority Member, respectively, of the Senate Committee on Commerce, containing an analysis of problems in the Rail Services Act of 1973 (Working Paper No. 1). A copy of that letter has been appended to "Rail Services Act of 1973", Rep. No. 93-601 (Sen. Committee on Commerce) (93d Cong., 1st Sess., 1973) at 130. A true and correct copy of the letter as reproduced therein is annexed hereto for the convenience of the Court and marked Exhibit E.

9. As a result of all of the above, plaintiffs submit that there is no genuine issue of material fact with respect to their right to the relief sought in their complaint, and, as the plaintiffs' brief filed herewith further shows, that they are entitled to such relief as a matter of law.

WHEREFORE, your deponent prays that this Court enter its judgment: (1) declaring that the Regional Rail Reorganization Act of 1973 is repugnant to the Constitution of the United States in the matters set out in the complaint herein; (2) enjoining the operation, execution and enforcement of the Regional Rail Reorganization Act of 1973 to the extent that such injunction may be necessary to preserving the constitutional rights of the plaintiffs herein; and (3) granting such other and further relief as the Court may deem appropriate.

Sworn to before me this
day of April, 1974

/s/ Louis A. Craco
Louis A. Craco

HELENE EINHORN
Notary Public, State of New York No. 24-6163990
Qualified in Kings County, Certificate filed in NY County,
Commission Expires March 30, 1976

[EXHIBIT A]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the facts hereinafter set out are deemed to be true, solely for the purposes of any motion for summary judgment or partial summary judgment made by any party in connection with the above-captioned matter, with the same force and effect as if they had been proved by competent and uncontradicted evidence. This stipulation pertains to the use of the following facts for the aforesaid purposes in this action only and in any other proceeding, cause, action, matter or context does not constitute agreement as to the accuracy of said facts.

IT IS HEREBY STIPULATED AND AGREED

1. Subsequent to June 21, 1970, the following lessors of leased lines of Penn Central Transportation Company (hereinafter respectively "Lessors" and "Penn Central") filed petitions for reorganization pursuant to Section 77 of the Bankruptcy Act in the Eastern District of Pennsylvania, Docket No. 70-347:

a. United New Jersey Railroad and Canal Co.
b. Beech Creek Railroad Co.
c. Cleveland, Cincinnati, Chicago & St. Louis Railroad Co.
d. Cleveland & Pittsburgh Railroad Co.
e. Connecting Railway Co.
f. Delaware Railroad Co.
g. Erie and Pittsburgh Railroad Co.

h. Michigan Central Railroad Co.
i. Northern Central Railway Co.
j. Penndel Co.
k. Philadelphia, Baltimore and Washington Railroad Co.
l. Philadelphia and Trenton Railroad Co.
m. Pittsburgh, Youngstown & Ashtabula Railway Co.
n. Pittsburgh, Fort Wayne & Chicago Railway Co.
o. Union Railroad Company of Baltimore

2. The following plaintiffs own the approximate principal amounts of mortgage bonds of Penn Central and of certain Lessors secured by mortgages on rail properties and other properties of Penn Central and certain Lessors set forth opposite their respective names:

a. Connecticut General Insurance Corporation	$ 31,025,000
b. Connecticut Mutual Life Insurance Company	9,985,000
c. The Equitable Life Assurance Society of the United States . .	147,509,000
d. Metropolitan Life Insurance Company	69,687,000
e. The Prudential Insurance Company of America	35,395,000

all as set forth in greater detail on pages 1 and 2 of Schedule A to Second Verified Report of Institutional Investors Penn Central Group as to Changes in Group Membership and Holdings (Doc. No. 7346).*

* Document references are to documents of record in reorganization proceedings of Penn Central under Section 77 of the Bankruptcy Act in the Eastern District of Pennsylvania, Docket No. 70-347.

3. The unpaid principal amounts of outstanding bonds issued under or secured by the indentures, mortgages and deeds of trust of which the plaintiffs which are corporate trustees or successor corporate trustees are as set forth on the chart attached hereto as Exhibit A.

4. It is likely that some of the rail properties of Penn Central and Lessors will be designated pursuant to each subsection of Section 206(c)(1) of the Regional Rail Reorganization Act of 1973 (the "Act") for transfer, sale or other conveyance pursuant to Section 206(d) of the Act in any final system plan prepared under the Act.

5. It will not be possible to ascertain until completion of the planning and approval process required by the Act

(i) which rail properties of Penn Central and Lessors will be designated for transfer or conveyance to Consolidated Rail Corporation ("CRC");

(ii) the value of such designated properties on a liquidation basis assuming liquidation is commenced as of the date hereof or as of any other given date;

(iii) the value of such designated properties on any basis other than a liquidation basis; or

(iv) the value of the consideration which will be exchanged for such designated properties.

6. The rail properties of Penn Central and Lessors which are likely to be designated for transfer or conveyance as hereinabove stipulated are likely to include some of the rail properties on which plaintiffs have liens; any rail properties of Penn Central or Lessors which are transferred or conveyed to CRC pursuant to the final system plan will be transferred or conveyed free and clear of any liens which plaintiffs may have on such properties.

7. As of February 28, 1974, Penn Central is generating deficit net railway operating income, deficit total income, deficit income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission.

[Source – Doc. No. 7224]*

8. Within the meaning of Section 207(b) of the Act, Penn Central is not "reorganizable on an income basis within a reasonable period of time under Section 77 of the Bankruptcy Act."

9. Without taking into account the Act or the implementation of any provision thereof, Penn Central is not able to achieve a successful reorganization as a common carrier within a reasonable period of time under Section 77 of the Bankruptcy Act.

10. During the period beginning on June 21, 1970, and ending on December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000, as shown in Trustees' Financial Statements for June 22-30, 1970, third quarter 1970, October 1970, November 1970, December 1970, 1971, 1972 and 1973.

[Source – Docs. Nos. 256, 431, 630, 786, 1309, 3415, 5224 and 6986]

11. During the period beginning on June 21, 1970, and ending on December 31, 1973,

(a) Penn Central utilized in operating its rail properties approximately $137,500,000 of non-recurring cash items as follows:

*Where appropriate, for ease of reference, the underlying source of the stipulated fact is indicated.

Source	Amount
Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000
Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from Madison Square Garden	2,400,000
Proceeds from Sale of Continent Compensation Fund	6,500,000
Total	$137,500,000

[Source – Doc. No. 7244 (Varalli affidavit, Ex. T-1)]

(b) Penn Central expended $2,100,000 in proceeds from drawdowns from mortgage indenture funds in connection with the Selkirk Yard Improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan.

[Source – Doc. No. 7244 (Varalli affidavit, Ex. T-1)]

(c) Penn Central utilized in operating its rail properties approximately $157,000,000 in income from non-rail properties as set forth in the analysis attached hereto as Exhibit B.

12. During the period beginning on June 21, 1970, and ending on December 31, 1973, Penn Central deferred approximately $241,000,000 in state and local taxes, which amount includes from $44,100,000 to $47,900,000 allocable to pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses stipulated in item 10 above.

[Source – Doc. No. 7245 (Guest affidavit, p. 5); Tr. pp. 11,162-63,* Stipulation between

*Tr. references are to the transcript in the above-mentioned Penn Central reorganization proceedings.

counsel for Penn Central Trustees and USA, ICC Transcript p. 1497, Letter dated April 1, 1974, from counsel for Penn Central Trustees to Judge Fullam]

13. During the period beginning on June 21, 1970, and ending on December 31, 1973, Penn Central deferred approximately $101,000,000 in rentals on leased line properties. It cannot be determined at this time whether unpaid leased line rentals are in fact a valid claim against the Penn Central estate or whether the Penn Central estate has claims against the lessor companies in respect of losses incurred by Penn Central in the operation of the leased lines since bankruptcy. The deferred leased line rentals are included in the ordinary net losses stipulated in item 10 above.

[Source – Doc. No. 7245 (Guest affidavit, p. 9); Tr. pp. 11,263-64, Guest ICC Exhibit 23, p. 4, Guest Testimony, ICC Transcript pp. 1,875-76]

14. During the period beginning on June 21, 1970, and ending on Dec. 31, 1973, Penn Central deferred approximately $104,000,000 in interest on mortgage and collateral trust debt. It has not yet been determined which issues of bonds are fully secured and therefore entitled to post-bankruptcy interest. The deferred interest on mortgage and collateral trust debt is included in the ordinary net losses stipulated in item 10 above.

[Source – Doc. No. 7245 (Guest affidavit, p. 9), Guest ICC Exhibit 22, p. 7, Guest ICC Exhibit 23, p. 4]

15. The aggregate amount of trustees' certificates issued by the Trustees of Penn Central is $100,000,000.

16. Neither the Penn Central Trustees nor any plaintiff herein has sought reorganization under the Act, by petition or otherwise.

Dated: April 15, 1974

/s/ Thomas L. Bryan
Attorney for Plaintiffs

/s/ Willaim R. Perlik
Attorney for Defendant
United States Railway Association

/s/ James F. Dausch
Atrorney for Defendants
Brinegar, Shultz, Stafford and
United States of America

BONDS OUTSTANDING UNDER INDENTURES OF SPECIFIED INDENTURE TRUSTEES

(Dollars in Thousands)

Indenture Trustee	Penn Central System	UNV	South Coast	Six Penn	Commercial	Michigan Central	Northern Central	PS&W	Penn Transit & Terminal	Elmira & Williamsburg	Total	Bank Officer
The Bank of New York	$276,047										$276,047	W.L. Baker, (V.P. Ref., Morgan Guaranty Trust)
Bankers Trust Company	69,132			$22,255		$9,397					110,784	James Patterson, V.P.
The Fidelity Bank		$20,000					$14,731				34,731	John H. Clapham, Assistant Secretary
The First Pennsylvania Banking and Trust Company								$ 44,642			44,642	William Knyrr, V.P.
Girard Trust Bank	191,305	8,310			$32,088					$983	232,566	G. Keller, Trust Officer
National Commercial Bank and Trust Company	4,346										4,346	James Conwell, V.P.
United States Trust Company of New York	8,054										8,054	Malcolm Hood, V.P.
American National Bank and Trust Company				46,277							46,277	Richard Gerlach, V.P.
Irving Trust Company	67,941		$4,592	3,135							75,668	James Vaughan, V.P.
Mellon Bank, N.A.								69,343			69,343	D.A. Haskell, V.P.
Wilmington Trust Company	17,111										17,111	Walter Sullivan, V.P.
Provident National Bank									$47,000		47,000	David Robb, V.P.
TOTAL	$633,736	$28,310	$4,592	$81,677	$32,088	$9,397	$14,731	$113,985	$47,000	$983 GRAND TOTAL	$966,669	

EXHIBIT A

ANALYSIS OF NET "NON-RAIL" INCOME
DETAIL OF COMPILATION

Source ICC Form R1:	Item	June 21 to Dec. 31, 1970	1971	1972	1973
		($ in millions)			
(1973 Line No. Ref.)					
Sched. 300 Line No. 33	Other Income	$26.7	$54.3	$56.5	$60.2
Less Rail Related Items:					
Sched. 300 Line No. 23	A/C 509-Inc. Lse. of R.E.	.1	.4	.3	.3
" " 26	512 Sep. Oper. Prop. Plt.	(Net Below)	.1		.1
" " 29	516 Inc. From Skg. Fds.	.8	3.5	3.6	5.2
Total	"Rail Related" Income	.9	4.0	3.9	5.6
	"Non-Rail" Income	25.3	50.3	52.6	54.6
Sched. 300 Line No. 43	Misc. Deductions	10.4	23.0	18.6	21.5
Less Rail Related Items:					
Sched. 300 Line No. 33	A/C 545-Sep. Oper. Prop. Loss	(Net) 1.4	4.2	3.5	4.3
" " 42	551 Misc. (L.V. Impairment)	2.3	8.4*	4.8	4.4
Total	"Rail-Related" Misc. Ded.	3.7	12.6	8.3	8.7
	"Non-Rail" Misc. Ded	6.7	10.4	10.3	12.9
"Non-Rail" Income less "Non-Rail" Misc. Ded.		19.1	39.9	42.3	41.8
Sched. 300 Line No. 4	Tax Allocation Cr.	(4.9)	3.9	7.1	8.0
Net Non-Rail Income		$14.2	$43.8	$49.4	$49.8

*Includes Service Interruption Policy of $3.9 Million

April 15, 1974

EXHIBIT B

[EXHIBIT C]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

C. C. SHANNON, being duly sworn, deposes and says:

1. I am President of Wyer, Dick & Company, Transportation and Traffic Consultants, ("Wyer Dick"), which is a wholly owned subsidiary of Edwards & Kelcey, Inc., Engineers and Consultants. My business address is 8 Park Place, Newark, New Jersey 07102. Wyer Dick has been retained by Institutional Investors Penn Central Group to advise it in connection with the reorganization of Penn Central Transportation Company.

2. The map which is annexed hereto as Exhibit A was prepared by personnel of Wyer, Dick under my supervision and direction. Exhibit A is an accurate depiction of the treatment of the lines of the Penn Central system (subject to certain minor abandonments of track) as proposed in the Report, "Rail Service in the Midwest and Northeast Region" by the Secretary of Transportation, submitted in accordance with Section 204 of the Regional Rail Reorganization Act of 1973 and dated February 1, 1974 together with certain supplements and corrections published by the Secretary of Transportation up to the date of this affidavit (the "Report").

3. Pursuant to the Penn Central Transportation Report, Form A, as of December 31, 1972, Penn Central Transportation Company operated approximately 19,850

miles of road including both owned and leased lines. The blue lines on Exhibit A depict portions of the Penn Central system which are not denominated by the said Report as being either not necessary to serve those points recommended for service or as duplicate feeder lines. Based upon my experience with the Penn Central system and with interpreting maps of this character, I estimate that the blue lines on Exhibit A cover between 12,000 and 13,000 miles of Penn Central operated trackage.

/s/ C. C. Shannon
C. C. SHANNON

Sworn to before me this
4th day of April, 1974.

/s/ Helene Einhorn
Notary Public

HELENE EINHORN
Notary Public, State of New York
No. 24-6163590
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

[EXHIBIT E]

The Secretary of Transportation,
Washington, D.C., November 14, 1973.

Hon. Warren G. Magnuson,
Chairman, Senate Committee on Commerce,
Washington, D.C.

Hon. Norris Cotton,
Ranking Minority Member, Senate Committee on Commerce, Washington, D.C.

Dear Mr. Chairman and Senator Cotton: In our letter to you of November 13 concerning the Rail Services Act of 1973 (Working Paper No. 1), we promised to send you by close of business today our analysis of the problems in the draft with respect to valuation and conveyance of rail properties and abandonment of rail lines, along with suggested amendments designed to overcome them. That is the purpose of this letter.

PROBLEMS WITH THE PRESENT DRAFT

At our urging, the House Committee made extensive changes in its original H.R. 9142 in an attempt to make it clear that the transfer of rail properties to the Corporation by railroads in reorganization was to be accomplished by a court approved exchange within the context of a reorganization under section 77 of the Bankruptcy Act, and not by condemnation of those properties. The reason for this was that both we and the sponsors of the House bill were convinced that to proceed by means of what a court might deem to be condemnation, rather than by reorganization, would have two undesirable consequences: the value that would be ascribed to the rail properties would be higher and that value, whether or not it was higher, would probably have to be paid in cash or, if not,

then the stock of the Corporation would have to be valued at its initial market value, rather than on the basis of its projected earning power over a reasonable period of time. The enclosed memorandum of law cites authorities for our conclusions in this regard.

Our preliminary estimate is that a taking by condemnation would raise the price very substantially. Even if it did not, the necessity of having to pay for the rail properties in cash or Government-guaranteed bonds would eliminate all chances for having a profitable, private enterprise railroad, which is the primary object of the legislation. (The only alternative would be to have the Government put up the cash or bonds, without recourse to the Corporation. That is clearly unacceptable.) For those reasons, we feel that it is imperative to avoid acquisition of rail properties by condemnation. In our opinion, the present draft does not avoid the condemnation pitfall.

The essence of condemnation is to deprive a property owner by operation of law of its options to do anything with his property but sell it to the Government or a designated public utility. While it may well be most advantageous for a railroad in reorganization to reorganize by conveying its assets to the Corporation pursuant to this bill, if all other options available to the railroad are foreclosed by the statute, then what you have is, in legal effect, a condemnation.

The issue here is not whether the Congress has the authority to condemn property: Nobody disputes that it does. Neither is it disputed that a reorganization court has authority to require the trustees of a railroad in reorganization to exchange rail properties for stock without the transfer being labeled "condemnation". A reorganization court clearly has the authority to do so, provided the

exchange is both "consistent with the public interest" and "fair and equitable" to the debtor's estate. But to avoid "condemnation", the court must have the option not to order the exchange.

The present draft (Working Paper No. 1) would eliminate for all time the option of dismissing the reorganization proceeding (page 35), and would leave the reorganization courts with what we believe to be only an illusory option.

At pages 26 and 47-48 the draft requires the conveyance of rail properties of the railroads in reorganization to the Corporation. This conveyance is required before any court can evaluate the proposed transaction and make a judgment as to whether it would be fair to the creditors of the railroads in reorganization to proceed in this manner. Although a railroad could ostensibly reorganize without conveying assets to the Corporation under the amendment to section 77 of the Bankruptcy Act at page 35 of the draft (and it is not even clear from the language of the draft that this would free it from the mandatory taking provisions), the draft requires that such a plan of reorganization be both approved and confirmed by the time the final system plan becomes effective.

In all likelihood, it would not be possible to get a plan approved and confirmed that quickly, even for a railroad which is relatively small. Thus, the courts would probably hold the option illusory. Moreover, even if it were a real option, it would not be feasible for those railroads in reorganization if the court were to find it impossible to reorganize on an income basis under section 77. And most of the railroads in reorganization may be in that position.

The present draft (at page 35) requires an adjudication of bankruptcy for any railroad which has not reorganized under section 77 by the effective date of the final system plan. Presumably, although the language of the draft does not make this clear, its rail properties designated in the final system plan for transfer to the Corporation or profitable railroads would be conveyed to the latter in the course of the bankruptcy proceedings. The declaration of bankruptcy would come after the effective date of the final plan (that is, after expiration of the period during which the Congress could amend or reject the plan); but if the reorganization court proceeds expeditiously to carry out the mandate of the bill, bankruptcy would be declared before the transfer of assets could be consummated.

We think that this is not only unnecessary but very costly. In a bankruptcy, secured creditors are permitted to foreclose on their security and the property in the estate is liquidated expeditiously so as to yield the maximum amount to creditors. There is no obligation to take the public interest into account. In section 77 proceedings, however, creditors are not entitled to foreclose on their security or reduce all property to cash. They have a continuing obligation to keep their equity invested in a public service enterprise. And the nature and amount of the securities which they receive in satisfaction of their claims is limited by the public interest in seeing to it that the reorganized railroad does not have a debt structure which is too great for it to bear. All that is required under section 77 is that the creditors receive fair and equitable treatment. While this does not mean that they can be given worthless paper, it does permit a reasonable amount of flexibility. Accordingly, the plan should be not only approved in a reorganization context, but consummated in a reorganization context.

Moreover, it would probably be in the best interests of creditors selling to the Corporation, and thereby getting out of the railroad business, to reorganize around their non-rail properties and tax loss carryforwards rather than liquidate. To deprive them of this right might itself be deemed a condemnation for which compensation would have to be paid.

For all of these reasons, we believe that it is very unwise to have the rail properties transferred in bankruptcy rather than in reorganization proceedings. That would appear to be an unintended result, and I believe that the enclosed amendments will cure the problem.

The present draft, at pages 26 and 51, permits the abandonment, absent a subsidy, of all rail properties of a railroad in reorganization which are not designated for rail service in the final system plan. Since we believe that a meaningful choice must be given to the special court on the issue of whether or not to order the transfer of rail properties pursuant to the final system plan, we also think that it is important to give the court as much incentive as possible to order such a transfer. We therefore think the right to abandon lines not designated for service in the final system plan should be a privilege conferred only upon railroads joining the Corporation and should be considered to be part of the benefit which they receive in exchange for transferring rail properties.

We dislike very much the term "just compensation value" because the language of just compensation is unmistakably that of the eminent domain clause of the Fifth Amendment of the Constitution. Moreover, the use of such a term is unnecessary. What the special court should do on deciding the adequacy of the compensation is look at the fairness and equity of the whole transaction or matrix

of transactions constituting compliance with the final system plan as well as all the consequences of proceeding with those transactions. The special court should not merely measure the value of the securities going to the railroads in reorganization against the value of the rail properties coming from them.

OUR PROPOSED AMENDMENTS

One of the main purposes of our proposed amendments, which are enclosed, is to avoid a court determination that the rail properties were acquired by condemnation. We therefore make it clear that what is being offered to the railroads in reorganization is an opportunity to reorganize by conveying some of its rail properties to the Corporation under the final system plan. We leave open the option in the special court to turn down this course of action if it cannot be done in a way which is fair and equitable to the estate, as well as in the public interest. But we give the special court the power to amend the plan so as to reallocate the stock of the Corporation and supplement it with a limited amount of FNRA bonds if that should be necessary. By applying a traditional test of a plan of reorganization (fairness and equity to creditors) to the question of whether the transfers of rail assets should be approved, we permit the special court to consider the value to the railroad of getting out of the railroad business by abandoning lines not conveyed (a privilege only available by conveying under the plan by virtue of our amendments) and being able to reorganize around non-rail properties with the help of a large tax loss carryforward. We also permit it to consider the public interest in effectuation of the final system plan, another matter traditionally considered in section 77 reorganizations.

In order to retain the benefits of reorganization under section 77 and the attractiveness of reorganization under this Act to the creditors, we do not require or even permit a railroad in reorganization to be adjudicated bankrupt.

While we believe that, in order to avoid condemnation, it is necessary to give the special court the right to turn the final system plan down with respect to each of the railroads in reorganization, we have posed the decision for the court in a traditional reorganization context and given it the power to amend the final system plan so that we think the chances for effectuation of the plan are extremely good.

We change the provisions requiring conveyance of rail properties before termination of the litigation before the special court because we believe that those provisions pose a serious risk that a court would characterize the process as condemnation. If this is to be deemed a reorganization, the court must have the opportunity to say no to the final system plan at a time when all the relevant facts can be presented to it. Instead, we authorize the special court to order the transfer of rail properties pending appeal.

In addition to the above amendments on valuation and transfer, there are several technical or clarifying changes enclosed herewith.

We appreciate the opportunity to give you our comments on your working draft. Please let us know if we can be of any further assistance.

Sincerely,

Claude S. Brinegar.

Enclosures.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs move the Court, pursuant to Fed. R.C.P. 56, for summary judgment in their favor on the grounds that there is no genuine issue of material fact and they are entitled to judgment in their favor as a matter of law. This motion is based upon the following:

1. The Complaint and Answer.

2. The Affidavit of Louis A. Craco, Esquire, being filed contemporaneously herewith and the Exhibits attached thereto, to wit:

A. Stipulation of facts entered into by the parties for the purposes of this motion;

B. Stipulation of the parties incorporating as part of the record for purposes of this motion extracts from the record *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

C. Affidavit of C. C. Shannon;

D. Letter of Claude S. Brinegar dated September 11, 1973 addressed to Hon. John Jarman, Chairman, Subcommittee on Transportation and Aeronautics of the Interstate and Foreign Commerce Committee of the House of Representatives;

E. Letter of Claude S. Brinegar dated November 14, 1973 addressed to Hon. Warren G. Magnuson and Hon. Norris Cotton, the Chairman and Ranking Minority Member, respectively, of the Senate Committee on Commerce; and

F. Report of defendant Claude S. Brinegar in his capacity as Secretary of Transportation of the United States of America, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports".

WHEREFORE, plaintiffs pray that this Court enter its judgment:

1. Declaring that the Regional Rail Reorganization Act of 1973 is repugnant to the Constitution of the United States in the matters set out in the Complaint herein;

2. Enjoining the operation, execution and enforcement of the Regional Rail Reorganization Act of 1973 to the extent that such injunction may be necessary to preserving the constitutional rights of the plaintiffs herein; and

3. Granting such other and further relief as the Court may deem appropriate.

/s/ Frederic L. Ballard
Frederic L. Ballard
Attorney for Plaintiffs

Of Counsel:

Willkie Farr & Gallagher
1 Chase Manhattan Plaza
New York, N. Y. 10005

Ballard, Spahr, Andrews & Ingersoll
Land Title Building
Philadelphia, Pa. 19110

Dated: April 16, 1974.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF INTERVENING DEFENDANTS
FOR SUMMARY JUDGMENT

Intervening defendants, George P. Baker, Robert W. Blanchette, and Richard C. Bond, Trustees of the Property of Penn Central Transportation Company, Debtor, move for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ John B. Rossi, Jr.

John B. Rossi, Jr.
John F. DePodesta
1836 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104
215–594-2271

Charles A. Horsky
Brice M. Clagett
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-293-3300

Attorneys for the Trustees of the property of Penn Central Transportation Company, Debtor

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in their favor on the grounds that there is no genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law. This Motion is based upon the following:

(1) Complaint and Answer;

(2) Stipulation of facts entered into by the parties for the purposes of any motion for summary judgment;

(3) Stipulation of the parties incorporating as part of the record in this Action extracts from the record in *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

(4) The portions of the record described in the preceding paragraph (3) which are cited and relied upon by Defendants in the Brief of Defendants in Opposition to Plaintiffs' Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, filed in this Action on May 17, 1974;

(5) Affidavit of Jerome E. Sharfman, dated May 10, 1974;

(6) Northeastern Railroad Problem, a Report to the Congress Submitted by the Secretary of Transportation in Response to S. J. Res. 59-2, dated March 26, 1973;

(7) Report of Defendant Claude S. Brinegar in his capacity as Secretary of Transportation, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports."

WHEREFORE, Defendants pray that this Court enter its judgment in favor of the Defendants and dismissing this Action.

May 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
United States Department of Justice

Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Shultz

/s/ William R. Perlik
WILLIAM R. PERLIK
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

AFFIDAVIT OF JOHN W. INGRAM

JOHN W. INGRAM, being duly sworn, deposes and says:

INTRODUCTION

1. My name is John W. Ingram. I am the Administrator of the Federal Railroad Administration within the United States Department of Transportation, a position which I have held since September 30, 1971. I was formerly the Vice-President of Marketing for the Illinois Central Railroad from 1966 to 1971; Director of Cost and Price Analysis at Southern Railway from 1961 to 1966; and Director of Profit Analysis for the New York Central Railroad from 1955-1961. I received my degree of Bachelor of Science in Business Administration from Syracuse University in 1952 and the degree of Master of Science in Transportation Economics from the Columbia Graduate School of Business in 1955.

2. This affidavit is submitted for the purpose of demonstrating that the Regional Rail Reorganization Act of 1973 ("Act"), P.L. 93-236, 87 Stat. 985, provides financial and legal resources whereby a financially self-sustaining rail system can be created around the rail system currently operated by railroads in reorganization in the Midwest and Northeast region ("region") of the Nation.

BACKGROUND OF REGIONAL RAIL PROBLEM

3. The rail industry in the region is afflicted by many special problems stemming in large part from its inability to adapt its operational patterns, most of which were laid out 50 or more years ago, to today's economic conditions. Unlike the railroads in other regions of the country which have experienced a general growth in rail traffic, eastern railroads have experienced a long-term post war decline in traffic.[1] The loss of rail traffic in the region was due to a number of factors most of which occurred concurrently, including the decline in the traditional coal and ore business which had provided the base traffic for many carriers, the shift in manufacturing activity to other regions, and the early completion of an extensive limited access highway system. Passenger traffic on eastern railroads – a service which had a significant bearing on the size and type of plant operated – declined from 24.0 billion to 3.7 billion revenue passenger miles during the period 1947 to 1973.[2]

4. Loss of traditional markets need not spell disaster for a business, of course. The normal response would be both to establish new services and gain new business, and to alter services and operations on that traffic which is declining so that the reduced volumes are handled as efficiently as possible. In either case, major changes in service, plant, and equipment are necessary. Because of a number of constraints, these changes did not occur either on a wide enough basis or rapidly enough to stem the

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[1] Source: Yearbook of Railroad Facts – 1974 Edition, Economics and Finance Dept., Association of American Railroads, page 29.

[2] *Id.* at 31.

decline of railroads operating in the region. Several of the bankrupt carriers were simply too small to develop new markets. The larger roads, which had the size to go after new traffic, found that the combined effects of a lack of capital, the natural reluctance of labor to change and the restrictive provisions of the Interstate Commerce Act made it difficult to eliminate unneeded services or to implement new services as rapidly as was required.

5. A similar situation thwarted most attempts to bring their plant and service levels down to the level required to handle lower volume efficiently. Regulatory constraints slowed attempts to reduce the level of passenger service and light density line operations. A lack of capital made reduction in the size of plant difficult to implement. For example, the New York Central, which did implement a number of plant reduction and modernization programs, was largely dependent on internal cash flow to financially support these programs. The basic source of capital for reducing their mainline from four to two tracks (using improved signalling to provide the needed capacity) was from the sale of scrap rail from the tracks being removed, and as a result a program which was started in the mid-fifties and could have been completed in three or four years never was completely accomplished.

6. Given the constraints, the basic management response was to keep costs less than revenues by deferring maintenance thereby setting up a classic cycle where, as the plant deteriorated the service levels declined, causing further loss of revenue which forced further cost reductions. The cycle resulted in the threat of cessation of service by many of the eastern bankrupt railroads and led to the passage of the Regional Rail Reorganization Act of 1973.

ACT PROVIDES COMPREHENSIVE PLANNING PROCESS

7. The Act has for its purpose the creation of a financially self-sustaining rail system in the region. To assure that this goal is met, the Act provided for the establishment of an independent corporation, the United States Railway Association ("Association"), to plan and finance the restructuring of a rail system that will be financially self-sustaining and adequate to meet the service requirements of the region, and by providing for the establishment of a private corporation, the Consolidated Rail Corporation ("Corporation"), to operate and modernize rail properties conveyed to it under the Final System Plan.

8. The planning process for restructuring rail service within this region is to be accomplished in seven basic steps:

(a) Within 30 days of the date of enactment of the Act, the Secretary of Transportation ("Secretary") was required to submit a report ("the Secretary's Report") containing his conclusions and recommendations for rail service within and between the several geographic zones of the region and describing the criteria used in developing those conclusions and recommendations. The Secretary issued his Report on February 1, 1974.

(b) The Rail Service Planning Office ("RSPO") of the Interstate Commerce Commission ("ICC"), established pursuant to the Act, was directed to hold public hearings on the Secretary's Report and prepare a report containing an evaluation of the Secretary's recommendations. The RSPO issued its Report on May 2, 1974.

(c) The Association will prepare a Preliminary System Plan based upon the Reports prepared by the Secretary and the RSPO ("First RSPO Report").

(d) The RSPO will hold public hearings on the Preliminary System Plan and prepare a Report evaluating the Plan ("Second RSPO Report").

(e) The Association will then prepare a Final System Plan taking into consideration the changes recommended by the Second RSPO Report and its own further studies.

(f) The ICC will prepare an evaluation of the Final System Plan.

(g) The Congress will have an opportunity to reject the Final System Plan before it becomes effective. If rejected, the Plan must be revised by the Association and returned to the Congress, and the Congress again has an opportunity to reject it.

FIRST REPORTS UNDER ACT HAVE IDENTIFIED PLANNING APPROACH AND STRATEGY FOR RESTRUCTURING THE RAILROADS IN REORGANIZATION INTO A VIABLE RAIL SYSTEM

9. Congress carefully developed the critical path of the planning process so that all elements in the restructuring of the northeastern rail system would be identified and so that all affected parties would have access and input to the planning process. The Secretary's Report was the initial step. Utilizing available data and expertise, the Secretary's Report presented the general planning approach and strategy for restructuring the railroads in reorganization into a viable system. The First RSPO Report represents the second step in the planning process. The RSPO hearing process affords all interested parties the opportunity to comment on the Secretary's Report and to present specific detail regarding service requirements which were not available for the Secretary's Report. Together, these two Reports provide

a solid base for subsequent steps by the Association as it proceeds with the planning process.

10. The Secretary's outline of major conclusions and recommendations, which are set forth in Attachment A. are not directly comparable to the RSPO outline of principal recommendations, which are set out in Attachment B. The Secretary's conclusions and recommendations focus upon outlining a general planning approach and directing the restructuring process toward retention of rail service rather than the rail plant itself. The RSPO's recommendations focus in detail upon the need to refine the quantitative criteria employed in the Secretary's analysis. For example, the conclusions and recommendations in the Secretary's Report give emphasis to the need to achieve major increases in the capital productivity of the industry, suggest a two level approach to a competitive reorganization of the industry, and emphasize the importance of participation by the region's solvent carriers in the reorganization. The RSPO recommendations urged the Association to seek more complete traffic data, to scrutinize with care the rail line capacity assumptions made by the Secretary, to evaluate the extent to which intramodal rail competition can be economically sustained, and to question whether or not the Secretary's estimates as to what constitutes an efficient size train are valid.

11. A close examination of the two Reports reveals, however, that the recommendations of both the Secretary and the RSPO to the Association are basically consistent. Some of the most important principles about which the Secretary and the RSPO Reports expressed substantial agreement are as follows:

A. *Productivity* – Both the Secretary and RSPO emphasized the need and opportunity to increase the efficiency

and the capital productivity of the rail industry. Quoting from the Secretary's Report,

> "The greatest potential for improvement in capital productivity lies in increasing the rate of utilization of the fixed plant (right-of-way and yards), increasing the productivity of equipment, and eliminating unnecessary excess capacity." Vol. I, page 8.

Part I of the Secretary's Report identified those aspects of rail operations which offered the greatest opportunity for major improvements in railroad efficiency and productivity and Part II evaluated in more detail the opportunities for improving railroad operating efficiency through restructuring interstate and local service. The Secretary suggested that the restructuring should seek to consolidate redundant routes serving parallel interstate flows and should seek to reduce inefficient duplication of local service.

Regarding mainline consolidation, the First RSPO Report states:

> "In line-haul operations, too, there are opportunities for increased efficiencies and savings. . . . Where closely parallel lines exist . . . two carriers might well share both, maintaining one to high standards . . . the other at a lower standard . . . ." Page 23.

Regarding local service the Report states:

> "In the port area around Newark, New Jersey, three railroads now operate yard facilities. . . . None operates its yards to their design capacity, ...

> "In . . . these situations modernization and consolidation of facilities would lead to far more efficient operation, lower costs, and far better service. The Association should look most carefully at this very fruitful field for accomplishing cost reductions and service improvements." Page 23.

B. *Competition* – Both the Secretary and RSPO emphasized that the restructuring should seek to enhance effective competition. Both Reports also recognized that there is a trade-off between intramodal competition and operating efficiency. In addition to indicating a two level approach to be taken in the restructuring process, the Secretary's Report presented a preliminary evaluation of where intramodal competition should be maintained. RSPO questioned and suggested weakness in the quantitative values employed in the Secretary's analysis, however, RSPO agreed with the analytical direction which the restructuring process should take. Quoting from the First RSPO Report,

> "We think it is safe to assume that, by any criterion, the major markets in the region can sustain competing rail operations, ... At the same time, there will no doubt be situations, . . . in which cost and other considerations will militate against the success of any attempt to promote or retain viable competitive services." Page 31.

C. *Cross-Subsidies of Uneconomical Service* – Both the Secretary and RSPO agreed that the rail industry should no longer be required to subsidize unprofitable light density lines. Based upon a generalized set

of screening criteria, the Secretary identified those lines which can be categorized as potentially excess or uneconomical lines and whose financial viability should be examined in detail by the Association. The RSPO urged the Association to improve upon the quantitative values used in the Secretary's analysis but it also states:

> "It is unquestionably true that there are excess rail lines in the region. Some are branch lines which do not, and will not, generate enough traffic – or the right kind of traffic – to turn a profit or otherwise to justify their continued existence. Despite hardships to individual users, their retention cannot be supported through cross-subsidization by users of other parts of the rail system, nor are they important enough . . . to warrant their receiving public subsidies." Page 16.

12. While it is probably accurate to say that the two Reports place differing degrees of emphasis on the importance of the three foregoing principles, I feel it is quite significant that at this stage of the process there is fundamental agreement regarding the direction in which the restructuring process should proceed.

ACT PROVIDES NEW REORGANIZATIONAL LEGAL AND FINANCIAL TOOLS TO CARRY OUT PLANNING APPROACH AND TO IMPLEMENT NEW REORGANIZATION STRATEGY

13. As noted in paragraph numbers three through six above, the railroad industry in the region is afflicted by many special problems stemming in large part from the

overcapacity of the rail system and certain fundamental changes that have occurred over the years in the economy of the region. The Act provides the following special procedures for overcoming these problems:

A (1). The Act provides for a new, single program by which the rail systems of the railroads in reorganization in the region can be restructured without the limitations typically imposed by corporate history and regulatory strictures. Prior to the passage of the Act, numerous legal hurdles (such as the requirements of Sections 1(18), 5, and 13a of the Interstate Commerce Act [49 U.S.C. §§1(18), 5 and 13a], and Section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. §4332(2)(C)]) effectively precluded railroads from achieving any significant restructuring of their rail system by requiring requests for abandonments, mergers, or consolidations to be handled on a costly and time consuming, case-by-case basis.

(2). The Act provides for a change of this situation by allowing the Association, free from the restraints of existing regulatory strictures, to develop a viable regional rail system, from the rail properties of the participating railroads. See Section 304(c), which modifies the normal ICC abandonment procedures; Section 601 (a), which provides that the antitrust laws are inapplicable to the formulation or implementation of the Final System Plan; Section 601(b), which provides that the provisions of the Interstate Commerce Act and the Bankruptcy Act are inapplicable to transactions under the Act to the extent necessary to formulate and implement the Final System Plan whenever a provision of any such Act is inconsistent with this Act; and Section 601(d), which provides that the provisions of Section

102(2)(C) of the National Environmental Policy Act of 1969 shall not apply with respect to any action taken under authority of this Act before the effective date of the Final System Plan.

B (1). By planning the restructured rail system on a regional basis the Association will be able to increase the productivity of the fixed plant and equipment of the participating railroads through the elimination of uneconomical and redundant capacity and modernization of the consolidated system.

(2). The following passage from the Secretary's Report highlights the excess rail capacity on the local service level which presently burdens the eastern railroads:

> "The dimensions of the duplication of service and excess capacity problems at the local service level can be illustrated by examining the case of Philadelphia's rail system. The city's 19th century transportation requirements brought into being more than 12 different railroads, some less than two miles long. Over the years, many of them were brought under the control of the Pennsylvania Railroad (now the Penn Central). The city's growth and expansion during the subsequent period left little chance to construct new modern yards, and regulatory requirements often stymied efforts to eliminate uneconomic trackage. As a consequence, Philadelphia today has a multitude of freight yards (18 operated by Penn Central, three operated by the Reading and two operated

by the Chessie System) and a maze of duplicative and often parallel trackage (much of which runs down the center of busy streets). The 150 square mile Philadelphia area is served by four Class I railroads which operate within the area approximately 500 miles of line haul trackage and more than 300 miles of yard and siding trackage, as illustrated in Figure 8. While this trackage was constructed to serve a large number of shippers, some have since gone out of business, many are only occasional users of rail service and only a few are users of high volume rail service. For example, although the Penn Central serves more than 1,800 users (industries, coal and ore facilities, grain elevators, intermodal facilities and food terminals), only 36 of these customers account for more than half of the traffic generated in Philadelphia.

> "While Philadelphia may be one of the more vivid examples of duplicate and uneconomic local rail service plant, the problem is by no means limited to metropolitan areas. The Bay City, Michigan, zone is an example of the excess capacity problem in a basically rural area. Annually, only 40,000 carloads originate or terminate in the Bay City Zone (about 110 per day), yet three different railroad lines connect the Bay City area to the south and the west (two Penn Central lines and one line of the Chessie System). Additionally, two parallel low density lines extend to the north from Bay City. Typically, each carrier maintains a separate local yard.

"As a result of this redundant railroad system at the local level there are often too many carriers vying for too little traffic with a consequent loss of efficiency, viability and service quality." Vol. I, page 69.

(3). This redundancy in rail capacity in the region is similarly acute on the interstate main line service level. As noted by the First RSPO Report:

"In line haul operations, too, there are opportunities for increased efficiencies and savings. The cost of maintaining a line to 60 mile per hour standards, for example, is far greater than cost of maintaining it to 30 mile per hour standards. In many markets, there is no real need for two railroads to expend the capital and maintenance dollars necessary to have two high speed lines. One such line, built and maintained on a shared cost basis, would supply both with the capacity they need at substantial cost savings. Where closely parallel lines exist (as they do, for instance, between Buffalo and Cleveland) two carriers might well share both, maintaining one to high standards for passenger and fast manifest trains, and the other at a lower standard for lower speed mineral trains or local freights. These are possibilities which should be considered by the Association as it makes its selection of facilities for the restructured regional rail system." Page 23.

(4). Given the planning flexibility provided by the Act, the Association will be able to devise a rail system which has a much higher capital productivity than that currently possessed by the component railroads in reorganization. The potential for increased capital productivity arises from the Association's ability to (a) consolidate yards and maintenance facilities, (b) provide for the Corporation and other profitable railroads sharing facilities and coordinating operations, (c) eliminate the existing, highly duplicative and underutilized individual railroad interstate main lines, as well as the uneconomic light density lines, thus reducing the magnitude of the capital costs that will be needed to rehabilitate the region's rail system. The product of this restructuring process will be the efficient utilization of rail capacity and freight cars, elimination of that portion of the rail network which is a drain on resources, and major improvement to the plant in order to maximize adequate and efficient service.

C (1). In addition to the unique opportunity provided by the Act for facilitating the institutional aspects of a restructuring of the region's rail system, the Act also provides the capital resources necessary to break the cycle of deferred maintenance, deteriorated facilities, poor service, and consequent loss of business.

(2). Significantly, Sections 210 and 211 of the Act authorize the Association to issue up to a billion dollars in federally guaranteed loans to the Corporation. This capital can be used for capital improvements and to eliminate deferred maintenance which would yield substantial returns in increased efficiency and, hence, increased traffic and increased profits. Furthermore, Section 215 of the Act authorizes the Secretary, with

the approval of the Association, to commit during the planning process up to $150 million in obligations of the Association for the upgrading of plant and equipment that will be in the Final System Plan. This infusion of new capital should help reverse the cycle of inadequate maintenance and capital improvements which has plagued the financial distressed railroads in the region for many years.

D. The Act provides a means for the Corporation to avoid cross-subsidization of financially non-compensatory rail lines. Rail lines of railroads reorganizing under the Act which are not included in the Final System Plan would either be abandoned (Section 304) or operated under the subsidy provisions (Section 402) of the Act. Section 402 provides up to $90 million in Federal subsidy funds to the States and local and regional transportation authorities for each of the two fiscal years including and following the effective date of the Final System Plan to pay for the transitional continuation of rail service on these lines. If the States or local or regional transportation authorities subsequently determine that it would be in their best interest to continue such rail service, Section 403 of the Act makes available acquisition and modernization loans to enable such bodies to purchase and upgrade these lines. Through this procedure the Corporation will retain the revenue to be derived from traffic moving to and from these lines, which otherwise might be lost if rail operations on such lines ceased, and yet the Corporation will not be required to underwrite the losses associated with these lines.

E. Even if the railroads in reorganization in the region had been able, on their own, to overcome the legal

hurdles and raise the necessary funds, the extremely high cost of providing protection to the rail employees who would be adversely affected by any major restructuring would have precluded necessary plant restructuring and modernization from taking place. Title V of the Act resolves this problem by permitting the Corporation to reduce its work force to the level actually needed, with the Federal Government assuming the labor protection costs up to the amount of $250 million. In addition, the Act gives the Corporation the extremely valuable right to reassign, reallocate, and consolidate its work force to any location in the system so long as the work is not removed from the coverage of collective bargaining agreements.

F. Another burden which railroads in reorganization in the region have had to bear is that of railroad passenger service deficits.

(1). In particular, Penn Central has never been able to get Amtrak to pay a return on its very substantial investment in the Boston-Washington Corridor, which is used primarily for passenger service. The Act solves this problem by requiring that the Final System Plan provide for the sale or lease to Amtrak by the Corporation of the rail properties in the Boston-Washington Corridor (Sections 206(c)(1)(C) and 601(d)(1)).

(2). With respect to commuter operations, the Act provides that the Final System Plan shall designate which rail properties of railroads which reorganize under the Act may be purchased or leased from the Corporation by a State, or local or regional transportation authority to meet the needs of commuter and intercity passenger service (Section 206(c)(1)(D)). The Association can make loans to such bodies to acquire rail

properties being abandoned pursuant to the Final System Plan and to modernize such properties (Sections 211(a) and 403). Given its planning authority under the Act, the Association will be in a strong position to assure that the Corporation is not saddled with commuter deficits.

PENDING LEGISLATION AND AN IMPROVED REGULATORY CLIMATE WILL STRENGTHEN THE RAILROAD INDUSTRY

14. Measures pending in Congress would strengthen the entire railroad industry, including, of course, Consolidated Rail Corporation.

15. The Surface Transportation Act of 1973 (H.R. 5385) ("STA") was introduced in the House last year by Representative Brock Adams, one of the sponsors of the Act. It had widespread support in both Congress and the railroad industry. STA provides up to $2 billion in loan guarantees for capital improvements in plant and facilities plus up to $3 billion in loan insurance for rolling stock. In addition, it provides $35 million for the design of a freight car information system for the purpose of improving freight car utilization. The STA also would require that rates cover variable costs, eliminate discriminatory State and local property taxation of rail assets, liberalize rail abandonment procedures, and provide for the promulgation by the ICC of standards and procedures for determining adequate rail carrier revenue levels.

16. The Secretary of Transportation has described the STA as "positive legislation"[3] and has proposed a similar

[3] Statement of Claude S. Brinegar, Secretary of Transportation, before the House Committee on Interstate and Foreign Commerce, (Cont'd)

bill known as the Transportation Improvement Act of 1974 ("TIA") (H.R. 12891 and S. 3237).

17. The TIA does substantially everything the STA does and, in addition, contains some reform provisions dealing with rate regulation.[4]

18. While no one can predict at this time the exact content of railroad legislation which will be forthcoming, the broad consensus in Congress, the Administration and the industry that some legislation of this type is badly needed, together with increasing public recognition of the importance of the railroads to the nation and the severity of their problems, makes it reasonable to believe that some bill along these general lines is likely to be enacted within the near future.

19. The ICC's implementation of regulatory policy indicates an increasing awareness and understanding of the problems facing the railroad industry. For example, the ICC has instituted investigations of the rail freight structure, Ex Parte 270 (Sub-Nos. 1-8), and railroad revenue rate base and rate of return levels, Ex Parte No. 271. In addition, the ICC recently approved a procedure designed to allow railroads' increases in fuel costs to be passed along to shippers promptly in the form of rate increases. Special Permission Order No. 74-1825. Chairman Stafford

(Footnote 3 cont'd)

on the Transportation Improvement Act of 1974, March 26, 1974, at p. 3.

[4] The TIA does not include the STA's provisions on rolling stock financing. Instead, it permits such financing to be guaranteed out of the $2 billion loan guarantee provisions applicable to capital improvements generally. On March 14, 1974, Congressman Adams introduced a new bill called the Rail Freight Transportation Improvement Act of 1974 which parallels the TIA in this regard (H.R. 13487).

of the ICC recently stated: "Our position of support for loan guarantees for the surface transportation industry is known. We believe they are desirable; with respect to railroads they are critical."[5] He further stated:

> Our task, as regulators, as I see it, is to do what we can to make the railroads attractive as investments once again, to render it profitable for the railroads to make the requisite expenditures for rolling stock and track rehabilitation, all, of course, consistently with the interests of the shippers and the general public.[6]

Moreover, Chairman Stafford has characterized implementation of the Act as "probably the single most important aspect of current railroad regulation. . . ."[7]

CONCLUSION

20. As the foregoing makes clear, the fact that the railroads reorganizing under the Act are not capable of reorganizing independently on an income basis under Section 77 of the Bankruptcy Act does not by any means

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[5] Statement of George M. Stafford, Chairman, Interstate Commerce Commission, before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 5385, H.R. 12891, H.R. 13487, and S. 1149 on March 27, 1974, at p. 52.

[6] Hearings before the Subcommittee on Department of Transportation and Related Agencies Appropriations of the House Committee on Appropriations, 93rd Congress, 2nd Session, March 28, 1974, Part 2, p. 357.

[7] *Id.* at 352.

mean that the restructured system will not be self-sustaining. On the contrary, the Act provides a mechanism, and resources designed by Congress to make that mechanism work, specifically tailored to permit the Corporation to overcome the major obstacles identified above that made the plight of the separate railroads now about to be brought into the Corporation on an integrated and slimmed down basis hopeless. The Act also provides the necessary capital to break the chronic fiscal crises of the railroads in reorganization.

/s/ John W. Ingram
John W. Ingram

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON:

Subscribed and sworn to before me this 23 day of May, 1974.

/s/ Barbara Windon
Barbara Windon
Notary Public

My commission expires August 14, 1978.

ATTACHMENT A

CONCLUSIONS AND RECOMMENDATIONS OF THE SECRETARY OF TRANSPORTATION IN HIS REPORT ON RAIL SERVICE IN THE MIDWEST AND NORTHEAST REGION

The Act directed the Secretary of Transportation to submit a comprehensive report containing his conclusions and recommendations with respect to the geographic zones in the midwest and northeast region within and between which rail service should be provided. The Secretary issued his Report in accordance with the Act on February 1, 1974. The Report, consisting of two volumes, contained the following conclusions:

> "A fundamental consolidation and restructuring of the region's railroad industry (including both bankrupt and solvent carriers) is required if the public policy goals described in the Act are to be realized.
>
> "The major benefits to be realized from this consolidation and restructuring will be, first, improved capital productivity and a viable financial base for the Corporation and other railroads in the region. This improvement will then lead to higher quality rail service for the entire region.
>
> "In order to achieve improved productivity, the existing, highly duplicative and underutilized individual railroad interstate mainlines in the region should be consolidated into a high volume, upgraded interstate network.

> "In order to maintain and enhance rail competition and improve efficiency of operations within the region, the Corporation and other solvent carriers should, to the fullest extent practicable, share facilities and coordinate operations over the high volume network.
>
> "Local rail service requirements in the region should be fulfilled generally with single carrier, direct rail service in order to give the rail mode a viable economic base and to support effective intermodal competition.
>
> "The existing, highly duplicative, feeder and local service network used for local rail services should be streamlined by permitting the abandonment of rail facilities which are not financially self-sustaining." Vol. I, page 2.

Based on these conclusions, the Secretary made the following recommendations:

> "The solvent carriers in the region are urged to become full participants in the planning and restructuring of the region's rail system.
>
> "The Association should concentrate its planning efforts on two levels of the region's rail system – local rail service and high volume, interstate rail service. Each of these levels must be restructured in order to improve the economic efficiency and financial viability of rail operations in the region.

"At the local service level, continued direct rail service should be provided for nearly all of the region's normal rail freight traffic. Less than 4 percent of the region's rail traffic is originated or terminated on lines which are potentially excess and most of this traffic can be retained by the rail mode through subsidy programs or combined motor carrier/rail service.

"At the interstate level, duplicative lines and facilities should be downgraded or eliminated and service coordinated with the goal of substantially increasing utilization of the consolidated and restructured system.

"At the local level, rail pick-up and delivery service should be coordinated so that it is provided by a single railroad in a given geographic area.

"Existing interstate routes should be consolidated to establish a high volume interstate network which warrants a major modernization program.

"Rail competition should be maintained only over the high volume interstate network between major traffic generating centers which provide a sufficient volume of rail traffic to produce at least eight train loads per day each moving more than approximately 200 miles in the same general direction. In our judgment other points do not require mainline service by more than one railroad." Vol. I, pages 2-3.

ATTACHMENT B

PRINCIPAL RECOMMENDATIONS CONTAINED IN THE RAIL SERVICES PLANNING OFFICE'S MAY 2, 1974 REPORT

The Act required the RSPO to study and evaluate the Secretary of Transportation's Report on rail services in the region and submit its report thereon to the Association. The RSPO Report contained the following principal recommendations to the Association:

"THE STATUTORY GOALS

The Association should give full consideration to the social goals enumerated in section 206(a) of the Act which time constraints prevented the Secretary from addressing in depth.

TRANSPORTATION DATA

The Association should seek more complete traffic data than was used in the Secretary's Report, ideally collecting sufficient data to develop historical trends and future traffic projections. A 1980 time horizon is suggested as reasonable for traffic projections.

The Association should give consideration to obtaining information from users of rail services and other available sources, including reliable industrial and population growth projections, and not rely solely on traffic flow data furnished by the railroads.

SYSTEM DESIGN AND ITS IMPLEMENTATION

The Association should consider lines as segments of a total system and evaluate their capabilities for contributing to overall system efficiency, rather than requiring that each line or mile of track meet a test of independent profitability.

The Association should scrutinize with great care the results of any attempt, based upon purely statistical methods, to identify particular rail facilities as redundant, and should test any such statistical conclusions in the light of the practical knowledge of those with experience in conducting railroad operations.

The Association should consider for inclusion in the system facilities which will permit the routing of through traffic around, instead of through, densely populated areas and which will permit the removal of yard and switching operations from areas where they now unduly obstruct traffic or impede national urban development.

The Association should not limit its selection of prospective main lines to lines which are now equipped with automatic signal systems, as did the Secretary.

The Association should consider alternate means of handling freight traffic now moving over the Northeast passenger corridor between

Boston, New York City, and Washington. The Final System Plan should include and provide for the improvement of routes which would make it possible to remove as much freight traffic as possible from the corridor.

The Association should give priority consideration to the selection of yard and terminal facilities needed to provide rail services in the region. This should be done in conjunction with, if not prior to, the selection of mainline routes.

The Association should recognize the problems attendant upon consolidating the services and facilities of a number of individual railroads and provide in the Final System Plan for a transition period during which the Corporation, or other acquiring railroads, can do the planning and personnel training, and make the capital improvements, necessary for implementation of the Plan.

LOCAL SERVICE

The Association should reject the Secretary's method of determining branch line viability which was based primarily – if not solely – upon the number of carloads handled.

The Association should consider whether to include certain marginal branch lines in the system. Their exclusion could result in their operation as independent short-line railroads, thus commanding a division of the

joint revenues which would result in the Corporation being placed in a poorer financial position than if it had operated these lines as branches.

SYSTEM CAPACITY

The Association should scrutinize with great care the rail line capacity assumptions made by the Secretary.

- In addition to the potential design capacity of a line, such other factors as grades, curvature, clearances, sidings, train mix, and maintenance requirements should be taken into account.
- The Association should determine the capacity of yards and terminals, both as an end in itself and as yard capacity affects the ability of main lines to achieve their theoretical capacity.
- The Association should consider the deteriorated condition of much of the rail plant in the region and include in the Final System Plan, at least temporarily, facilities sufficient to meet service needs while other facilities – perhaps potentially superior – are being upgraded to a capacity level which can provide the service required.

EQUIPMENT SUPPLY AND MAINTENANCE

The Association should give consideration to the selection of car building and car and

engine repair facilities necessary to sustain the operations of the Corporation.

RAIL COMPETITION

The Association should reevaluate the Secretary's conclusions concerning competitive rail service.

- The extent to which intramodal rail competition can be sustained should be addressed carefully, and consideration should be given to alternative dispositions of the properties of the railroads in reorganization which would make possible the profitable co-existence of competing rail systems in the region.
- The Secretary's assumption that the ability of a particular route, point, or market to sustain competitive rail service can be determined on the basis of the number of train operations experienced in a given period should be tested with care.
- The Association should consider whether the Secretary's conclusions as to what constitutes an 'efficient size' train are valid, and the extent to which adjustments in those conclusions would affect his recommendations concerning the degree to which competitive rail service can be provided economically.

– In determining where intramodal rail competition can be maintained, the Association should consider grouping several of the zones into which the Secretary divided the region, especially in the Northeast where the zones tend to cover small geographic areas.

JOINT USE

The Association should accept and implement the Secretary's recommendation that rail facilities be used jointly be more than one carrier wherever it is feasible and cost-effective to do so.

PASSENGER SERVICE

The Association, in making mainline selections, should consider those lines which currently carry passenger traffic, and those which have passenger service potential, in three separate categories: long-haul intercity; intermediate distance, high-density intercity; and commuter.

IMPACT UPON PROFITABLE RAILROADS

The Association should consider the competitive impact of the operation to be conducted by the Corporation upon all the surviving profitable railroads including switching and terminal companies in the region, and take steps to assure the continued viability of those carriers.

PUBLIC PARTICIPATION

The Association should scrutinize with care the material – both factual and conceptual – submitted, and to be submitted, to the Office by users of rail services, government officials at all levels, and other interested members of the public.

The Association should begin at once to devise a means for making prompt and widespread distribution of the Preliminary and Final System Plans. Otherwise effective public participation in further stages of the planning process will be impossible in view of the extremely tight statutory timetable." Pages 3-5.

DOCKET ENTRIES

in the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

in

Smith v. *United States, et al.*,

No. C.A. 74-180

(Later transferred to
Eastern District of Pennsylvania,

No. C.A. 74-1107)

Date	Proceedings	Date of Judgment
1974		
Jan. 25	Complaint, appearance; filed	
Jan. 25	Summons, Copies (4) and Copies (4) of Complaint issued DA. Serv. 1-28-74.	
Jan. 25	APPLICATION for a Three-Judge Court. AG. Serv. 1-28-74. #2 & 3 Serv. 1-28-74.	
Feb. 12	OPPOSITION of deft. #1 to the immediate convening of a Three-Judge Court; Attachment; Exhibits A, B & C; c/s 2-12-74; appearance of James F. Dausch.	
Feb. 22	WITHDRAWAL of opposition by deft. #1 to the convening of a three-judge court; consent by deft. #3; exhibit; c/m 2-22-74.	
Feb. 25	REQUEST for designation of Three Judge Court. Parker, J.	
Mar. 1	DESIGNATION of the Honorable Harold Leventhal, United States Circuit Judge, and the Honorable Thomas A. Flannery, United States District Judge, to serve with the Honorable Barrington D. Parker, United States District Judge as members of a three-judge panel to hear and	

1974		
Mar. 1 (cont'd)	determine this case. (Letters sent) J. Skelly Wright, Acting Chief Judge, U.S.C.A.	
Mar. 11	ANSWER of all defts. to complaint; c/m 3-11-74; appearance of James F. Dausch.	
Mar. 11	CALENDARED CD/N.	
Mar. 15	APPEARANCE of William R. Perlik as counsel for deft. #3; Cal/N.	
Apr. 3	MOTION of George P. Baker, Robert W. Blanchette and Richard C. Bond to intervene as party defts; P&A; Exhibit; Exhibits A&B; c/s 4-3-74; Deposit by Clagett $5.00; appearance of Brice M. Clagett.	
Apr. 9	MOTION of defts. for transfer pursuant to 28 USC, 1404(a); Consent by pltf; P&A; Attachments A&B; c/m 4-9-74.	
Apr. 11	CONSENT by defts. to intervention and transfer; c/m 4-11-74.	
Apr. 17	ORDER granting motion of deft. to transfer this cause to the Eastern District of Pennsylvania; directing Clerk to effect the transfer. (N) Parker, J.	
Apr. 29	ORIGINAL file and certified copy of docket entries mailed to Clerk, USDC for the Eastern District of Pennsylvania pursuant to order of 4-17-74.	
May 3	ACKNOWLEDGMENT of receipt of original file and Certified copy of docket entries from the Clerk, USDC for the Eastern District of Pennsylvania.	

Proceedings

in the

United States District Court
for the Eastern District of Pennsylvania

No. C.A. 74-1107

Date		Proceedings	Date of Judgment
1974			
1	May 1	Original Record together with certified copy of docket entries Received from U.S.D.C. District of Columbia, Washington, D.C., filed.	
2	" 1	Appearance of Spencer Ervin and W. B. Ruthrauff, Esqs. for the plff, filed.	
3	May 2	Plff's motion for summary judgment, filed.	
4	" 2	Plff's memorandum of points and authorities in support of Plff's motion for summary judgment and for expedited consideration thereof, filed.	
5	" 2	Stipulation of Plff. and Defts. as to factual matters, filed.	
6	" 3	Order GRANTING Motion of George P. Baker et al. leave to intervene in this action, filed. 5/6/74 entered and copies mailed.	
7	" 3	Stipulation by the parties that extracts from the record of *In the Matter of Penn Central Transportation Company, Debtor* be made a part of the record in this case, filed.	
8	" 3	Order FIXING 6/3/74 for a hearing on Plff's motion for summary judgment, etc., filed. 5/6/74 entered and copies mailed.	
9	May 10	Motion of George P. Baker, et al. intervenor Defts. for summary judgment, memorandum of points and authority, and certificate of service, filed.	
10	May 10	Affidavit of Jerome E. Sharfman, filed.	

1974			
11	May 16	Order FIXING 6/3/74 at 10:00 A.M. for hearing on intervening Defts. motion for Summary Judgment; that all parties file responsive briefs by 5/24/74; and that intervening Defts. may file reply briefs by 5/30/74, filed. 5/17/74 entered and copies mailed.	
12	May 17	Defts. brief in opposition to Plff's motion for summary judgment and in partial opposition to intervening Defts. motion for summary judgment, filed.	
13	" 24	Defts' Motion for Summary Judgment, and Notice thereof, filed.	
14	" 24	Affidavit of John W. Ingram, re Regional Rail Reorganization Act of 1973, etc., filed.	
15	May 29	Reply of Penn Central Trustees to "Brief of Defts. in opposition to Plff's motion for Summary Judgment and in Partial opposition to intervening Defts' motion for Summary Judgment," filed.	
16	May 29	Reply brief of New Haven Trustee to the joint brief of the Governmental Defts. and to the motion of the Penn Central Trustees, intervening Defts., for Summary Judgment, filed.	
17	May 31	Brief of Penn Central Trustees in opposition to Plff's motion for Summary Judgment, filed.	
18	May 31	Reply brief of New Haven Trustee to brief of Penn Central Trustees, Intervening Defts. dtd. 5/24/74, filed.	
–	May 30	Joint documentary submission – extract from record of Penn Central Bky. Vol. 1 items 1-35, filed. (C.A. 74-189)	
–	" 30	Joint documentary submission – extract – from record of Penn Central Bky. Vol. 2 items 36-61, filed. (C.A. 74-189)	
–	" 30	Legislative history of the regional rail reorganization act of 1973, filed. (C.A. 74-189)	
–	June 3	Argued sur: Plff's motion for summary judgment – C.A.V. Defts' and intervening defts. motion for summary judgment – C.A.V.	

1974

19	June 3	Plff's motion of New Haven Trustee to Strike Affidavit of John W. Ingram, filed.
–	June 6	Transcript of 6/3/74, filed. (C.A. 74-189)
20	June 25	Copy of Opinion and Order ALDISERT, C.J., FULLAM, J. and BECHTLE, J. enjoining U.S. Railway System from certifying a Final System Plan to Special Court, etc., enjoining defts. from taking any action to enforce provisions of Sec. 304(f) of the RRRA with respect to abandonment, etc.; enjoining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA joining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization under §77 of the Bankruptcy Act, entering Declaratory judgment that Sec. 303 of RRRA is null and void as contravening the Fifth Amendment, etc.; Sec. 304(f) of the RRRA is null and void as violative of the Fifth Amendment, etc.; that Sec. 207(b) of RRRA as requires reorganization courts to dismiss pending bankruptcy proceedings as violative of Art. I Sec. 8 Clause 4 of the Constitution; plffs. motions for partial summary judgment are granted in part and in all other respects denied; defts. motions for summary judgment are denied, filed. cys. to all parties 6/25/74 – entered 6/26/74.
–	July 2	Notice of appeal to the United States Supreme Court, filed. (C.A. #74-189)
21	July 3	Plff's Notice of Appeal to U.S. Supreme Court, filed.
22	July 17	Deft. U.S. Railway Association's Notice of Appeal to U.S. Supreme Court, filed.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

COMPLAINT

Plaintiff Richard Joyce Smith, as Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor, by his attorneys, for his complaint alleges upon information and belief:

1. This is an action for an injunction restraining the enforcement, operation and execution of the Regional Rail Reorganization Act of 1973, Public Law 93-236 (the "1973 Act"), for repugnance to the United States Constitution, and for a declaratory judgment pursuant to the provisions of §§2201 and 2202 of Title 28, United States Code. Jurisdiction of this Court is predicated upon 28 U.S.C. §§1331, 1337 and 1651, and upon the United States Constitution, including Article I, Sections 8 and 9, Article III and the Fifth and Tenth Amendments thereto. The matter in controversy involves property having a value in excess of $10,000, exclusive of interest and costs. A three-judge district court is requested pursuant to 28 U.S.C. §§2282 and 2284.

2. This is an action to annul, enjoin and set aside one or more orders of the Interstate Commerce Commission (the "Commission") pursuant to §2321 of Title 28, United States Code. The United States is named as a party defendant pursuant to 28 U.S.C. §2322. A three-judge district court is requested pursuant to 28 U.S.C. §§2325 and 2284.

3. Plaintiff Richard Joyce Smith (the "New Haven Trustee") is the sole Trustee of the property of The New York, New Haven and Hartford Railroad Company (the "New Haven"), a Connecticut, Massachusetts and Rhode Island railroad corporation, which since 1961 has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, under the jurisdiction of the United States District Court for the District of Connecticut, Case No. 30226 (the "New Haven Reorganization Court"). Title to the assets of the New Haven are vested in the plaintiff New Haven Trustee in accordance with §77(c) of the Bankruptcy Act.

4. Among the assets owned by the New Haven Trustee is $34,025,800 principal amount of 5% Divisional First Mortgage Bonds due 1994 ("Bonds") of Penn Central Transportation Company, a Pennsylvania railroad corporation ("Penn Central"), which since June 21, 1970 has been in reorganization under §77 of the Bankruptcy Act under the jurisdiction of the United States District Court for the Eastern District of Pennsylvania, Bkcy. No. 70-347 (the "Penn Central Reorganization Court"). The Bonds were issued under, and secured by a Divisional First Mortgage dated as of December 31, 1968 ("Mortgage") from Penn Central to The Fidelity Bank and Joseph F. McDonald, as indenture trustees (the "Indenture Trustees").

5. Payment of principal of and interest on the Bonds is now due and payable as the result of the occurrence of one or more Events of Default (as that term is defined in the Mortgage), including, *inter alia*, the non-payment of interest due on the Bonds since the last interest payment on January 1, 1970.

6. The lien of the Mortgage includes land, track, stations, facilities and other valuable improvements constituting certain of the former properties of the New Haven which were conveyed by the New Haven Trustee (together with his then co-Trustee) to Penn Central on December 31, 1968 pursuant to applicable orders of the Commission and the New Haven Reorganization Court.

7. The value of the property securing the payment of the Bonds as provided in the Mortgage is in excess of $34,025,800 plus interest thereon since January 1, 1970.

8. The New Haven Trustee has filed a Proof of Claim dated May 31, 1971 with the Penn Central Reorganization Court in which the following claims are set forth:

> *Claim A:* This is a claim for the purchase price, as ordered by the Supreme Court of the United States (*New Haven Inclusion Cases*, 399 U.S. 392 (1970)) for assets of the New Haven acquired by Penn Central on December 31, 1968. The amount of the claim is for principal indebtedness of $174,635,899 plus unpaid interest to May 31, 1971 of $21,533,812; or a total claim to that date of $196,169,711. The offsets to the total claim are recognized by the New Haven as $41,939,841 producing a net claim at May 31, 1971 of $154,229,870. The security interest and liens securing such claim are the lien of the Mortgage securing $34,025,800 principal amount of Bonds; 956,576 shares of common stock of Penn Central Company, a Delaware corporation which owns 100% of the common stock of

Penn Central; an equitable lien on all of the former assets, exclusive of rolling stock, of the New Haven; and, if said equitable lien does not extend to the former interest of the New Haven in the excess income from the so-called Grand Central Terminal Properties, a constructive trust of the income applicable to such former interest.

Claims B and C: These claims relate to amounts owed by Penn Central to the New Haven Trustee under an agreement dated April 21, 1966 with the predecessors in interest of Penn Central and to an amount owed to the New Haven Trustee under an order of the Commission dated January 16, 1970.

The New Haven Trustee's Proof of Claim has not been adjudicated by the Penn Central Reorganization Court, but pending adjudication said Court has, pursuant to its Order No. 546, ordered that the New Haven Trustee has a tentative lien, indeterminate in amount and priority, upon all real property and certain personal property formerly owned by New Haven and in the possession of Penn Central on June 11, 1971.

9. Certain issues involved in the Proof of Claim relating to the claimed equitable lien and constructive trust are disputed by the Penn Central Trustees and are now pending before the Commission, which has reopened various New Haven and Penn Central proceedings for the purpose of deciding issues open on remand from the United States Supreme Court, *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

10. The Mortgage provides for various legal and equitable remedies pursuant to which the properties subject to the Mortgage may, upon an Event of Default, be sold at the direction of the Indenture Trustees for the purpose of paying the principal and interest on the Bonds. Said provisions are hereinafter collectively referred to as the "Foreclosure Remedies".

11. Exercise by the Indenture Trustees of the Foreclosure Remedies is enjoined by Order No. 1, dated June 21, 1970, of the Penn Central Reorganization Court.

12. The statutory authority for the restraint against exercise of the Foreclosure Remedies by the Indenture Trustees set forth in Order No. 1 of the Penn Central Reorganization Court is the first sentence of §77(j) of the Bankruptcy Act, which reads in pertinent part as follows:

> "(j) In addition to the provisions of section 11 of this Act for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree;"

and the provisions of §11 of the Bankruptcy Act, 11 U.S.C. §29, referred to in said §77(j).

13. On January 2, 1974 the President of the United States signed the 1973 Act.

14. Defendant Claude S. Brinegar is the Secretary of the United States Department of Transportation ("DOT"; Mr. Brinegar being hereinafter referred to as the "Secretary

of DOT"). Under §204 of the 1973 Act, the Secretary of DOT must prepare a comprehensive report on rail services in the midwest and northeast sectors of the United States within 30 days after enactment of the 1973 Act. This Complaint seeks to enjoin and set aside any and all actions of the Secretary of DOT under the purported authority of the 1973 Act on the ground that said Act in its entirety, and each of its sections separately, are unconstitutional and void.

15. Defendant United States is named pursuant to 28 U.S.C. §2322 as a defendant insofar as this Complaint seeks an injunction pursuant to 28 U.S.C. §§2321 and 2325 against one or more orders of the Commission, an independent regulatory agency of the United States charged with regulation of railroads and other carriers as set forth in the Interstate Commerce Act. The Commission has responsibility for the formulation of plans of reorganization for railroads in reorganization under §77 of the Bankruptcy Act. Under §205 of the 1973 Act, the Rail Services Planning Office (the "Office") is created within the Commission. The Office is delegated the responsibility of holding hearings upon and evaluating the report of the Secretary of DOT referred to in ¶14 and holding hearings on and evaluating the "preliminary system plan" to be prepared by defendant United States Railway Association under the 1973 Act. The Commission also is delegated responsibility by Section 207(d) of the 1973 Act to evaluate the "final system plan" prepared by defendant United States Railway Association, and to submit to Congress its report thereon. This Complaint seeks to enjoin and set aside any and all orders of the Commission and the Office under the purported authority of the 1973 Act on the ground that said Act in its entirety, and each of its sections separately, are unconstitutional and void.

16. Defendant United States Railway Association (the "Association") is a nonprofit federal corporation of the District of Columbia, being established pursuant to §201 (a) of the 1973 Act. The Association has the primary responsibility under §207(a) of the 1973 Act for preparation and implementation of the preliminary and final system plans of reorganization of certain railroads now in reorganization which conduct business principally in 17 specified states and the District of Columbia, defined in the 1973 Act as the "region." Formulation of the preliminary system plan is to be based upon the report of the Secretary of DOT and the Office's evaluation and financial studies, and upon the Association's independent investigations, consultations, research, evaluation and analysis. This Complaint seeks to enjoin and set aside any and all actions of the Association under the purported authority of the 1973 Act on the ground that such Act in its entirety, and each of its sections separately, are unconstitutional and void.

17. The New Haven Trustee is informed, believes, and therefore avers, that implementation of the provisions of the 1973 Act by the several defendants will deprive him of property worth not less than $34 million in violation of his rights under the Fifth Amendment to the United States Constitution not to be deprived of property without due process of law.

18. The New Haven Trustee is informed, believes and therefore avers, that implementation of the provisions of the 1973 Act by the several defendants will deprive him of property worth not less than $34 million and subject such property to a public use in violation of his rights under the Fifth Amendment to the United States Constitution not to have his property taken for public use without just compensation.

19. The New Haven Trustee believes and therefore avers that if the defendants are not enjoined from proceeding to carry out the provisions of the 1973 Act he will suffer irreparable injury for which he has no adequate remedy at law in any court of the United States or of any State, and in support of such averment states that the legislative history of the 1973 Act discloses an intent on the part of Congress not to appropriate any moneys of the United States for the purpose of paying any amount in respect of just compensation for a taking for public use.

20. The New Haven Trustee is advised, believes and therefore avers, that the provisions of §§77(g) and (i) of the Bankruptcy Act, prior to enactment of the 1973 Act, authorized the Penn Central Reorganization Court to dismiss Penn Central's reorganization proceedings whenever it found that the constitutional limits imposed by the Fifth Amendment would be exceeded and constitutionally protected rights impaired if restraint upon creditors pursuant to the first sentence of §77(j) were continued. Upon dismissal of reorganization proceedings by the Penn Central Reorganization Court pursuant to §77(g) and institution of an equity receivership pursuant to §77(i), the Commission's Order of September 28, 1973, Finance Docket No. 26241, Penn Central Transportation Company Reorganization, – I.C.C. –, part of which requires continuation of hearings relative to a plan of reorganization under §77(d), would be vacated by operation of law, and thereafter the Commission would have no legal basis for taking any action or entering any order relative to the reorganization or other bankruptcy proceedings affecting Penn Central and its properties.

21. Sections 77(g) and (i) of the Bankruptcy Act provide the necessary "escape valve" to support the constitutionality of a restraint upon creditors' rights authorized by the first sentence of §77(j) by limiting the authority to restrain creditors to situations in which the debtor railroad can be successfully reorganized within a reasonable period of time. The foregoing interpretation of §§77(g) and (i) has been accepted in principle by numerous authorities, including the Penn Central Reorganization Court in its Memorandum and Order No. 1137, *In re Penn Central Transportation Company*, 355 F. Supp. 1343, 1345 (E.D. Pa. 1973). By its Report and Order dated September 28, 1973, in Finance Docket No. 26251, referred to in paragraph No. 20, supra, the Commission decided that it would not approve any plan for reorganization of Penn Central. In rejecting the plan for reorganization filed by the Penn Central Trustees, the Commission ruled as follows:

> "Liquidation of a railroad as envisioned by Penn Central's trustees is not, in our view, within the purview of Section 77 and certainly does not require or contemplate the use of our expertise to preside over the dismemberment of a railroad. If dismemberment and liquidation are to be the fate of Penn Central, there is ample provision in law for it to be handled elsewhere. Section 77 (g) and (i) contemplate possible dismissal of a reorganization proceeding and transfer of the properties to a receiver in equity."

22. On October 9, 1973, the New Haven Trustee filed a Motion ("New Haven Trustee's §77(g) Motion") with the Penn Central Reorganization Court seeking dismissal of Penn Central's reorganization proceedings under §77(g) of

the Bankruptcy Act and the institution of an equity receivership as contemplated by §77(i). The New Haven Trustee is advised, believes and therefore avers, that, unless the 1973 Act is declared unconstitutional and void, the relief requested by the New Haven Trustee's §77(g) Motion, namely, liquidation of Penn Central's rail properties under an equity receivership pursuant to §71(i), will be rendered impossible. Section 304(f) of the 1973 Act provides in pertinent part that:

> "After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association. . . ."

Said §304(f), together with a definition of "railroad in reorganization" in §102(12) which includes equity receiverships, effectively moots the New Haven Trustee's §77(g) Motion and destroys the constitutional safeguards of §§77 (g) and 77(i) of the Bankruptcy Act, without which the restraints upon creditors' foreclosure of liens authorized by the first sentence of §77(j) of the Bankruptcy Act is rendered unconstitutional. The effect of §304(f), in combination with other provisions of the 1973 Act, and the provisions of the first sentence of §77(j) of the Bankruptcy Act, is to take away from the New Haven Trustee, as holder of the Bonds, the contractual right under the Mortgage to demand that the Indenture Trustees exercise their Foreclosure Remedies; and such deprivation is made permanent by the provisions of the 1973 Act which are designed to compel the conveyance of the rail properties of Penn Central now subject to the Mortgage to Consolidated Rail Corporation, a governmental proprietary

corporation proposed to be created pursuant to the 1973 Act under the laws of one of the States, and to divest the lien of the Mortgage insofar as it applies to the properties so conveyed. The right to demand that the Foreclosure Remedies be exercised is a valuable property right of the New Haven Trustee that will be lost forever unless the defendants are permanently enjoined from proceeding to effectuate the provisions of the 1973 Act which are unconstitutional.

23. The New Haven Trustee is advised, believes and therefore avers, that if the 1973 Act is declared by this Court to be unconstitutional and void, such declaration will not infringe upon any matter within the exclusive jurisdiction of the Penn Central Reorganization Court, but will on the contrary enable that court to pass on the merits of the New Haven Trustee's §77(g) Motion after hearing and opportunity for parties, including the Commission, to advise the court as to their position, all as contemplated by §77(g) of the Bankruptcy Act prior to the enactment of the 1973 Act.

24. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is unconstitutional and void as a violation of the provisions of Article III of the Constitution on the following grounds:

A. In Section 102(12) of the 1973 Act, the term "railroad in reorganization" is defined to mean

> "a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization pursuant to this Act as prescribed in Section 207(b) of this Act. A 'bankruptcy proceeding' includes a

> proceeding pursuant to Section 77 of the bankruptcy act (11 U.S.C. 205) and an equity receivership or equivalent proceeding."

The first sentence of Section 207(b) of the 1973 Act requires each United States District Court or other court having jurisdiction over a railroad in reorganization, within 120 days of the enactment of the 1973 Act, to

> "decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act."

The New Haven Trustee is advised, believes and therefore avers, that said first sentence of Section 207(b) is an unconstitutional delegation to a court created pursuant to Article III of the United States Constitution of functions which are legislative and administrative and not judicial in character.

B. The second sentence of Section 207(b) of the 1973 Act requires each United States District Court or other court having jurisdiction over a railroad in reorganization, within 60 days of the filing of the Report by the Office prescribed by Section 205(d)(1) of the 1973 Act, to

> "decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act."

The third sentence of Section 207(b) declares

> "Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the bankruptcy act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding."

The New Haven Trustee is advised, believes and therefore avers, that said second and third sentences of Section 207(b) is an unconstitutional delegation to an Article III Court of functions which are legislative and administrative and not judicial in character. In addition, the third sentence of Section 207(b) is unconstitutional in that the standard prescribed by Congress in clause (2) thereof, e.g., unless the court

> "finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization,"

is unconstitutionally vague in meaning and is an unconstitutional delegation by Congress to a court of a purely legislative function, to wit, whether or not the public interest referred to in the first part of said third sentence is so

significant that, irrespective of whether the railroads in reorganization are reorganizable, they should be compelled to reorganize by conveyance of their rail properties to a new railroad, Consolidated Rail Corporation, to be created under and pursuant to the 1973 Act.

C. The fourth sentence of Section 207(b) of the 1973 Act provides that if the district court does not enter an order or make any finding, reorganization must proceed in accordance with the 1973 Act. Such sentence purports to require an Article III Court to make a finding or enter an order, even though no "case" or "controversy" be presented, and improperly prescribes a legislative consequence if the Court declines to enter such an order or make such a finding.

D. The fifth sentence of Section 207(b) of the 1973 Act provides that an appeal from an order made by a district court under Section 207(b) lies only to a special three-judge district court ("Special Court") created pursuant to Section 209 of the 1973 Act. Pursuant to Section 209(b) of the 1973 Act, the defendant Association is empowered to apply to the judicial panel on multi-district litigation authorized by 28 U.S.C. §1407 for the appointment of the Special Court. The Special Court is authorized to exercise the powers of a district judge, and its powers include those of a reorganization court, thereby confirming that the Special Court is intended by Congress to be an Article III court. The fifth sentence of Section 207(b) is unconstitutional on the grounds that it purports to confer jurisdiction upon an Article III court to review the prior findings and order of the district court which are themselves legislative and administrative and not judicial in character.

E. The sixth sentence of Section 207(b) provides:

> "There shall be no review of the decision of the special court."

Said sixth sentence is unconstitutional in that it purports to withdraw jurisdiction from all United States courts to hear a "case" or "controversy" brought by claimants to the estate of a railroad in reorganization, such as the New Haven Trustee, seeking to prevent the reorganization of a railroad, such as Penn Central, under the 1973 Act on the ground that reorganization under the 1973 Act will deprive such claimants of their property without due process of law and constitute a taking of their property for a public use without payment of just compensation. Congress is without power, under Article III of the Constitution, to preclude exercise by the United States courts of the "judicial power" referred to in Sections 1 and 2 of Article III; and is without power to preclude the exercise by the Supreme Court of its "appellate jurisdiction" referred to in the second sentence of Section 2 of Article III of the Constitution, as applied to a "case" which arises "under this Constitution." The sixth sentence in Section 207(b) is, accordingly, void as an unconstitutional limitation upon the jurisdiction of both the United States Supreme Court and the "inferior courts" in which are vested the judicial power of the United States referred to in Sections 1 and 2 of Article III.

F. Section 209(a) of the 1973 Act provides:

> "Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance

> with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

Section 209(b) of the 1973 Act provides for defendant Association to make application to the judicial panel on multi-district litigation for the

> "consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan."

The principal functions of the Special Court authorized by Section 209 are set forth in Section 303 of the 1973 Act: (i) Under Section 303(b), it is instructed to receive securities and compensation deposited by proposed transferees of rail properties, and to order conveyance of rail properties; and (ii) under Section 303(c), it is directed to make findings which include

> "whether the transfers or conveyances . . . are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act. . . ."

and

> "whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum."

Said provisions of Sections 209 and 303 of the 1973 Act are unconstitutional as a delegation to an Article III court of functions which are legislative and administrative in character. In addition, the determination of whether the transfers or conveyances "are more fair and equitable than is required as a constitutional minimum" imposes upon an Article III court the purely legislative function of enacting laws which comport with the United States Constitution, and is void as an unconstitutional delegation of legislative power to the judicial branch of government.

G. The first two sentences of Section 209(a) of the 1973 Act, quoted in Paragraph F above, and the last sentence of Section 303(b)(2) of the 1973 Act, which reads

> "Such conveyance shall not be restrained or enjoined by any court."

are each unconstitutional on the ground that they exceed the power of Congress under Section 2 of Article III of the Constitution to define the respective areas of jurisdiction of the several "inferior courts" in which Article III vests the "judicial power" of the United States to hear cases arising under the Constitution. The Special Court to be created pursuant to the 1973 Act is a court of limited jurisdiction which is not empowered to hear a case arising under the Constitution. The first two sentences of Section 209(a), and the last sentence of Section 303 (b)(2), are accordingly void as an attempt by Congress to withdraw from the Supreme Court and the inferior courts created pursuant to Article III the judicial power to enjoin an act of Congress on constitutional grounds.

H. The last sentence of Section 303(d) of the 1973 Act, which reads

> "The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss."

is unconstitutional on the ground that Congress lacks the power under Article III of the Constitution to infringe upon the judicial process by prescribing a legislative rule for deciding a case properly within the appellate jurisdiction of the Supreme Court. The legislative standard employed by this Section, "not in the interest of an expeditious conclusion of the proceedings," would, if not declared null and void, impair the rights of claimants to the Penn Central estate, such as the New Haven Trustee, to judicial appellate review "both as to Law and Fact" within the meaning of the second sentence of Section 2 of Article III of the Constitution. The effect of this legislative standard would also be to deprive the New Haven Trustee of property without due process of law guaranteed by the Fifth Amendment to the Constitution.

25. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is unconstitutional in its substantive effects upon parties, such as the New Haven Trustee, who hold vested property interests in the form of mortgage liens upon the property of a railroad in reorganization, such as Penn Central, on the following grounds:

A. Pursuant to Section 303(b)(1) of the 1973 Act, the Special Court created pursuant to Section 209 of the 1973 Act is required to order the Penn Central Trustees "to convey forthwith to the Corporation [Consolidated Rail Corporation] and the respective profitable railroads operating in the region, all right, title, and interest in rail properties of such railroad in reorganization" pursuant to a "final system plan" formulated by defendant Association with the assistance of the Office and the Commission and approved or acquiesced in by the Congress of the United States pursuant to Section 208 of the 1973 Act. Pursuant to Section 303 (b)(2) of the 1973 Act, the conveyances which the Special Court is required to order are required to be made "free and clear of any liens and encumbrances" such as, for example, the lien of the Mortgage securing the $34,025,800 principal amount of Bonds owned by plaintiff New Haven Trustee. The effect of Section 303(b) of the 1973 Act will be to deprive secured creditors of Penn Central, including the New Haven Trustee, of property rights recognized by state statutory and common law, viz. their mortgages upon real property of Penn Central and their right to foreclosure remedies, without due process of law guaranteed by the Fifth Amendment to the Constitution. Such deprivation of property rights will not be compensated by the creation of other property rights of equivalent value.

B. Under the provisions of Section 303(c), the consideration for rail properties required to be conveyed to Consolidated Rail Corporation ("CRC") will be in the form of securities of CRC, together with a maximum of $500 million of obligations of defendant Association, which consideration will be delivered to the trustees of railroads in reorganization, such as Penn Central, pursuant to section 303 (c)(4). No provision of the 1973 Act is designed to provide secured creditors with a substituted lien upon such

compensation as is ordered to be paid by CRC and defendant Association. The effect of Sections 303(b) and (c) of the 1973 Act is accordingly to impair the contract rights of secured creditors of Penn Central, such as the New Haven Trustee, to demand that rail properties subject to their mortgage liens be sold at public auction and the proceeds of sale be devoted to the payment of the obligations secured thereby, in violation of the due process clause of the Fifth Amendment to the Constitution; and to provide no substitute property to be placed under the mortgage liens of said secured creditors.

C. No provision of Section 303 of the 1973 Act permits the Special Court to decline to order the conveyances therein provided for on the grounds that the effect is to deprive any claimant to the estate of Penn Central of his property without due process of law, or on the ground that the effect is to take a claimant's property for a public use without payment of just compensation, as required by the Fifth Amendment to the United States Constitution.

Section 303 of the 1973 Act accordingly lacks the statutory safeguards which are required by prior decisions of the Supreme Court upholding the constitutionality of Section 77 of the Bankruptcy Act.

26. Section 101(a) of the 1973 Act contains Congressional findings that may be paraphrased as follows:

> (1) Essential rail service in the midwest and northeast region of the United States is provided by insolvent railroads, such as Penn Central, which are attempting, so far unsuccessfully, to undergo reorganization under §77 of the Bankruptcy Act;

> (2) This essential rail service is threatened with cessation because of the inability of trustees of such railroads, such as the Penn Central Trustees, to formulate acceptable plans of reorganization;
>
> (3) The continuation of efficient rail service in the region is required to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, the United States mail, shippers, States and political subdivisions, and consumers;
>
> (4) Continuation of efficient rail service in the region is required to maintain adequate national rail services and an efficient national rail transportation system;
>
> (5) Rail service offers economic and environmental advantages with respect to land use, air pollution, energy efficiency and conservation, resource allocation, safety, and cost per mile to such extent that preservation and maintenance of adequate and efficient rail service is in the national interest;
>
> (6) The needs summarized in Paragraphs (1) to (5) above cannot be met without substantial action by the Federal Government.

The New Haven Trustee is advised, believes and therefore avers, that the purpose of the 1973 Act, as revealed by Section 101(a) summarized above, is to "take" certain of the rail properties of seven railroads in the region now in reorganization, namely Penn Central, Lehigh Valley Railroad Co., Reading Company, Boston and Maine Corp., Central Railroad Co. of New Jersey, Erie Lackawanna Railway

Co. and Lehigh and Hudson River Railway Co., for a "public use," the preservation of essential rail service in the region which will cease in the absence of "substantial action" by the Federal Government. Accordingly, if enforcement of the 1973 Act is not enjoined, the defendants will be empowered to effect a "taking" for public use by the United States of the rail property of Penn Central, and of the property of the New Haven Trustee to the extent that he owns liens on the rail properties of Penn Central, without the "just compensation" required by the Fifth Amendment to the United States Constitution.

27. The New Haven Trustee is advised, believes and therefore avers that the provisions of Section 303(b) of the 1973 Act, requiring the Special Court to order conveyances of rail properties of Penn Central to Consolidated Rail Corporation ("CRC"), would if not enjoined constitute an exercise by Congress of the sovereign's power to condemn private property for the public uses specified in Section 101(a) of the 1973 Act, without the necessary just compensation being provided by the United States as required under the Fifth Amendment to the Constitution. Such just compensation is peculiarly within the power of Congress to grant, because the seventh sentence of Section 9 of Article I of the Constitution provides in pertinent part:

> "No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law. . . ."

No provision of the 1973 Act contains any appropriation by the Congress of the United States of any moneys of the United States for the purpose of paying the claims of the New Haven Trustee, or other Penn Central secured

creditors, or the Penn Central estate for just compensation for the property rights which are proposed to be taken for a public use.

28. The New Haven Trustee is advised, believes and therefore avers, that CRC is in fact and in law a governmental proprietary corporation formed solely to advance the public interests of the United States referred to in Section 101 of the 1973 Act. The governmental control over CRC is set forth, *inter alia*, in Sections 301(c), (d), (e), (f) and (g), and Section 302 of the 1973 Act. As a consequence of CRC's status as a governmental proprietary corporation, the provisions of Section 303(b) of the 1973 Act requiring the Special Court to order the conveyance by Penn Central and other railroads in reorganization of their rail properties to CRC amounts in fact and in law to a taking for public use by an instrumentality of the United States of such rail properties without provision of the constitutionally required just compensation.

29. The New Haven Trustee is advised, believes and therefore avers, that the provisions of Section 303(b) of the 1973 Act which would divest the liens of creditors with mortgages upon the rail properties required to be conveyed by Penn Central to CRC constitute an implied taking of such mortgage liens for a public use within the meaning of the takings clause of the Fifth Amendment to the United States Constitution without the constitutionally required just compensation being provided to the holders of the mortgage liens whose property is so taken. The mortgage liens of the creditors divested by the 1973 Act may, by reason of Section 211 thereof, be replaced by liens in favor of the United States. Loans proposed to be made by the defendant Association to CRC may under Sections 211(d) and 211(e)(3) be secured by new

first mortgage liens upon the rail properties which CRC proposes to acquire from railroads in reorganization under Section 303(b) without the consent of persons holding valid perfected first mortgages on such properties, such as the Mortgage securing the Bonds owned by the New Haven Trustee. The effect of divestment under Section 303(b) of presently existing mortgage liens, and the Congressinal intent disclosed in Section 211 to subject properties to be acquired by CRC to new liens to secure loan obligations of CRC to defendant Association, is, in fact and in law, the same as if Congress had condemned all existing mortgage liens upon the rail properties designated in the final system plan created by defendant Association with the assistance of the Commission and defendant Secretary of DOT.

30. The New Haven Trustee is advised, believes and therefore avers, that he does not have an adequate remedy at law for damages against defendant United States for the takings described in Paragraphs 27, 28 and 29 above. Under the provisions of 28 U.S.C. §§2517 and 2518, relating to judgments of the Court of Claims, the effect of a judgment by the Court of Claims against the United States that the New Haven Trustee's property had been taken and was required to be compensated pursuant to the Fifth Amendment would be to create an obligation which would not be enforceable in the absence of an act of Congress to appropriate moneys of the United States Treasury. The seventh sentence of Section 9 of Article I of the Constitution, quoted in ¶27 above, similarly requires an appropriation by Congress to draw money from the Treasury to pay for any actual or implied taking. The legislative history of the 1973 Act establishes that Congress has determined not to appropriate any moneys of the United States Treasury for takings under the 1973 Act.

31. The New Haven Trustee is advised, believes and therefore avers, that in Section 303(c) of the 1973 Act Congress has purported to define the compensation which shall be awarded for the takings of private property for public use provided for in Section 303(b) of the 1973 Act, and has thereby exceeded its constitutional powers since the determination of what kind and amount of property constitutes "just compensation" is exclusively a judicial function. Section 303(c)(2) authorizes the Special Court to enter a judgment against CRC providing for constitutional deficiencies in consideration to be made up solely by securities of CRC and obligations of defendant Association issued to CRC pursuant to the Final System Plan. Said Section 303(c)(2) restricts the jurisdiction of the Special Court by making it impossible for the Special Court to enter a judgment requiring the "just compensation" provided for by the Fifth Amendment to be paid in legal tender of the United States, and precludes an effective judgment for a taking by the sovereign. Section 210(b) of the 1973 Act further restricts the availability of obligations of the defendant Association issued to CRC to $1 billion, of which not exceeding $500 million are available for purposes other than loans for the rehabilitation and modernization of rail properties proposed to be acquired by CRC. The effect of Section 303(c), in conjunction with Section 210(b), is to restrict the obligations of the United States with respect to payment for rail properties conveyed to CRC to a maximum of $500 million of obligations of defendant Association. Although obligations of defendant Association may be guaranteed by defendant Secretary of DOT pursuant to Section 210(c) of the 1973 Act, thereby placing the credit of the United States behind the takings authorized by the 1973 Act, the sum of $500 million is established as a legislative ceiling

upon obligations of the United States to pay for rail properties proposed to be conveyed to CRC. Such legislative ceiling bears no reasonable relation to the value of the properties to be taken as evidence by the legislative history of the $500 million ceiling and the fact that Congress enacted such ceiling prior to any valuation, determination or adjudication of the value of the properties being taken. Congress has thus made it impossible for the Special Court to fulfill the legislative standard of constitutionally adequate consideration referred to in Section 303(c). As a consequence, Section 303(c) fails to provide a constitutionally adequate mechanism for assuring that the Penn Central estate will in fact receive just compensation for its rail properties ordered to be conveyed pursuant to Section 303(b).

32. The New Haven Trustee is advised, believes and therefore avers, that notwithstanding the Congressional findings set forth in Section 101 of the 1973 Act concerning the public interest in maintaining efficient rail transportation in the region, the 1973 Act is not a valid constitutional exercise of the power of Congress to "regulate commerce . . . among the several states," on the ground that such clause of Section 8 of Article I of the Constitution does not authorize Congress to compel railroads in reorganization, such as Penn Central, their secured creditors and other claimants to their estates, to devote their respective properties to the public good without any reasonable expectation of profit or return on the fair value of their investment. No provision of the 1973 Act purports to guarantee that CRC, to which rail properties are to be conveyed under Section 303(b) of the 1973 Act, will have either earnings from railroad operations or reasonable prospect of attaining the same. The fact that railroads proposed to be reorganized under the 1973 Act will

have been found not to be reorganizable on an income basis by their respective reorganization courts under Section 207(b) of the 1973 Act establishes that CRC will not have earnings sufficient to support an income-based capitalization. The provisions of Section 303(b) of the 1973 Act requiring rail properties of railroads in reorganization to be conveyed to CRC accordingly cannot be supported under the "Commerce Clause" of Section 8 of Article I where, as here, Congress has not authorized or appropriated moneys for the purpose of exercising the sovereign's right of condemnation.

33. The New Haven Trustee is advised, believes and therefore avers, that Section 304(f) of the 1973 Act, in conjunction with other provisions of the 1973 Act and the first sentence of §77(j) of the Bankruptcy Act, deprives him, all secured creditors of Penn Central, and all other claimants of the Penn Central estate, of property of substantial value without due process of law and takes his and their property for a public use during the period of not less than 620 days from the date of enactment of the 1973 Act until the date of conveyance of Penn Central's rail properties, without providing just compensation, all in violation of the Fifth Amendment to the United States Constitution. Such deprivation of property without due process of law and such taking of property for public use without payment of just compensation will be caused by the requirement of Section 304(f) of the 1973 Act that all of Penn Central's rail operations, including numerous lines of railroad the operation of which are unprofitable as evidence by the provisions of Title IV of the 1973 Act for "rail service continuation subsidies," be continued in operation for an interim period of not less than 620 days without provision for governmental subsidies of the type provided by said Title IV of the 1973 Act.

34. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is unconstitutional in its entirety on the ground that it deprives him, other secured creditors of Penn Central, and other claimants to the Penn Central estate, of equal protection of the laws, which protection is embraced within the "due process" clause of the Fifth Amendment to the United States Constitution, and exceeds the constitutional power of Congress to pass "uniform laws on the subject of bankruptcies throughout the United States," and in support of such averment states:

A. Section 102(13) of the 1973 Act defines "region" to mean the

> "States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order)."

B. The 1973 Act amends Section 77 of the Bankruptcy Act as to railroads in reorganization in the "region" defined as set forth in Section 102(13), and leaves Section 77 of the Bankruptcy Act in effect without amendment as to any railroad which is in, or may hereafter file for, reorganization and which does business primarily in States other than those enumerated in Section 102(13).

C. The effect of the 1973 Act is to deprive creditors of railroads in reorganization which are located in the "region" of equal protection of the laws as compared with creditors of railroads doing business primarily in the 33 states not included in the definition of "region."

D. The 1973 Act purports to be a law "on the subject of bankruptcies" which on its face is not "uniform" and not applicable "throughout the United States," and is therefore beyond the constitutional powers conferred upon Congress by Section 8 of Article I of the Constitution.

E. The 1973 Act is unconstitutional in its entirety in that, under the last paragraph of Section 8 of Article I of the Constitution, Congress is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," and such powers do not include the power to pass a non-uniform law on the subject of bankruptcies whereby one law is made applicable to bankrupts doing business in 17 states plus the District of Columbia and another law is made applicable to bankrupts in the same line of business doing business in the other 33 States of the Union.

35. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is intended to provide principally for the compulsory reorganization of Penn Central and a subsidiary, Lehigh Valley Railroad Co., and as such is unconstitutional on both the ground that it is not a uniform law on the subject of bankruptcies and on the ground that it constitutes a bill of attainder proscribed by Section 9 of Article I of the Constitution.

36. The New Haven Trustee is advised, believes and therefore avers, that he will suffer irreparable injury in the event his rights to insist upon immediate exercise by the Indenture Trustees of their Foreclosure Remedies is not protected by an injunction restraining defendant Association, the Commission, and defendant Secretary of DOT, from carrying out their respective functions assigned to them by the 1973 Act, including preparation of a preliminary and final system plan for Penn Central and other railroads in reorganization, and in support of such averments, states:

A. The evidence adduced before the Commission in hearings pursuant to Section 77(d) held in August and September, 1973 (*Penn Central Transportation Company Reorganization*, Finance Docket No. 26241), discloses that continued operation of Penn Central's railroad on the present basis is causing the value of the properties available to satisfy creditor claims to be lessened, and the amount of priority administration claims to be increased, at a rate which approximates $200 million per year, this effect being characterized as the "erosion" of the Penn Central estate by the Commission in its September 28, 1973 Report and Order. Although the Commission concluded that it was unable to deal with the constitutional issue of "taking" under the Fifth Amendment on the ground that such issue was judicial in nature, the issue is now squarely presented by the provisions of the 1973 Act which will, if not enjoined, require Penn Central to continue to suffer "erosion" at the rate of $200 million per year for at least 620 days after enactment of the 1973 Act; to offset said erosion Penn Central will at best receive the major portion of $85 million of federal moneys as "emergency assistance" under Section 213 of the 1973 Act, leaving a

net uncompensated erosion of not less than $263 million during said 620 day period.

B. The constitutional issues raised by the New Haven Trustee in this complaint are ripe for adjudication at this time. The New Haven Trustee alleges that the 1973 Act is *per se* unconstitutional, and accordingly, no decision by defendant United States Railway Association as to the nature of the "final system plan" could affect the constitutional issues presented.

37. The New Haven Trustee is advised, believes and therefore avers, that he lacks an effective alternative remedy to the declaratory and injunctive relief sought by the complaint, and in support of such averment states:

A. The procedures contemplated by Section 207(b) of the 1973 Act for the making of legislative and administrative findings by the Penn Central Reorganization Court and the Special Court is not an effective alternative remedy because such proceedings are not and cannot be considered "judicial" in nature, and any order entered under Section 207(b) is void *ab initio* as not within the jurisdiction of an Article III court. The New Haven Trustee intends to raise before the Penn Central Reorganization Court the contention that Section 207(b) is void and accordingly does not confer jurisdiction upon that Court. The Penn Central Reorganization Court, however, is lacking in subject-matter jurisdiction and in jurisdiction over the persons of the defendants named in this Complaint and accordingly is unable to grant the relief requested by this Complaint.

B. The procedures contemplated by Section 303 of the 1973 Act do not provide an adequate alternative remedy because the Special Court is required by Section 303(b)

to order conveyance of properties, and divestiture of liens, before judicial review of adequacy of consideration commences under Section 303(c). The Section 303(b) functions of the Special Court are void *ab initio* because they are legislative and administrative functions improperly assigned to an Article III court; however, unless enforcement of the 1973 Act is enjoined, the conveyance of properties and divestment of liens called for by Section 303(b) will become *fait accompli* before there is any judicial review under Section 303(c).

C. Such judicial review by the Special Court as is permitted by Sections 303(c) and 303(d) of the 1973 Act fails to cure the constitutional defects in that the only remedy open to the Special Court is to enter a "judgment" against CRC in favor of the estate of a bankrupt railroad. Such a "judgment" against CRC is not property of value because it represents only a claim against an entity which has as its only assets the properties transferred to it by Penn Central and such other railroads in reorganization as are designated by their reorganization courts to be reorganized under the 1973 Act. In light of the provisions of the 1973 Act, any attempt by a railroad in reorganization which conveyed its properties to CRC to "enforce" a "judgment" against CRC by petition to sell the assets conveyed would be unsuccessful because of the provisions of Section 304(e) of the 1973 Act, which forbid abandonments of rail properties acquired by CRC absolutely for two years and thereafter unless and to the extent the same are authorized by the Commission pursuant to applicable provisions of the Interstate Commerce Act. In addition, a "judgment" against CRC would create a liability which, *pro tanto*, would reduce the value, if any, of the Common Stock of CRC which, under Section 303 of the 1973 Act, forms the principal consideration

to be given to Penn Central in exchange for its rail properties, and thus increase the deficiency of consideration.

D. The 1973 Act does not provide a constitutionally adequate mechanism for the transfer of liens on properties conveyed to CRC, thereby depriving secured creditors of their property without due process of law within the meaning of the Fifth Amendment to the Constitution. By requiring the divestment of mortgage liens as authorized by Section 303(b) of the 1973 Act without provision for mortgage liens to attach to the proceeds of sale of the properties conveyed, Congress has failed to provide the constitutional safeguard provided by Section 77(o) of the Bankruptcy Act. Under Section 77(o) of the Bankruptcy Act, liens which are divested in connection with any permitted sale of property of a railroad in reorganization are immediately transferred by operation of law to the proceeds of such sale.

E. A suit against the United States in the United States Court of Claims to recover the "just compensation" to which the New Haven Trustee is entitled under the Fifth Amendment will not provide an effective remedy at law because of material uncertainty as to whether the provisions of the 1973 Act are intended to preclude the Court of Claims from hearing such a suit, and because the enforceability of any judgment for money rendered by the Court of Claims in favor of the New Haven Trustee would depend on appropriations by Congress under Section 9 of Article I of the Constitution.

38. There being no adequate remedy at law, the defendants should be enjoined from carrying out the provisions of the 1973 Act which are repugnant to the Constitution.

WHEREFORE, plaintiff New Haven Trustee respectfully prays:

1. That a three-judge district court be convened to hear and determine this suit, pursuant to 28 U.S.C. §§2282 and 2284, and that the suit be heard and decided with the greatest possible expedition.

2. That in accordance with 28 U.S.C. §2284(2), at least five days' notice of the hearing be given to the Attorney General of the United States, to the United States Attorney for the District of Columbia, and to defendants Secretary of DOT and Association.

3. That the Court convened in accordance with 28 U.S.C. §2284, after hearing on motion for summary judgment or trial as may be deemed appropriate, enter a declaratory judgment in favor of plaintiff New Haven Trustee decreeing:

(a) That the provisions of Section 207(b) of the 1973 Act purporting to confer jurisdiction upon the several reorganization courts with jurisdiction over railroads in reorganization to make the findings and orders referred to therein are void on the ground that the jurisdiction of an Article III court can extend only to "cases" and "controversies" and not to legislative and administrative decisions, and accordingly such reorganization courts lack jurisdiction to make any findings or to enter any orders under Section 207(b); and that the Special Court to be created pursuant to Section 209 of the 1973 Act lacks jurisdiction to review any findings or orders of the several reorganization courts.

(b) That the provisions of Section 303(b) of the 1973 Act purporting to confer jurisdiction upon the Special Court to administer the deposits of money and securities

by transferees and to order the conveyance of properties of railroads in reorganization and the divestment of liens of secured creditors are void on the ground that the jurisdiction of an Article III court can extend only to "cases" and "controversies" and not to legislative and administrative decisions, and accordingly the Special Court which is to be created upon petition of defendant United States Railway Association lacks jurisdiction to take the actions or enter the orders called for by said Section 303(b).

(c) That the New Haven Trustee's property rights evidenced by the Bonds and the Mortgage, including his right to demand exercise by the Indenture Trustees of the Foreclosure Remedies against Penn Central's property which is subject to the lien of the Mortgage, be adjudged to be a property interest which, if the 1973 Act were not enjoined, would be subject to taking by governmental action without due process of law and for a public use without just compensation by the 1973 Act in violation of the Fifth Amendment to the United States Constitution.

(d) That the 1973 Act as an entirety be declared unconstitutional and void as exceeding the power of Congress under Article I, Section 8, of the Constitution to pass uniform laws on the subject of bankruptcies throughout the United States, and as constituting discriminatory legislation which amounts to a bill of attainder proscribed in Section 9 of Article I of the Constitution.

(e) That the 1973 Act as an entirety be declared unconstitutional and void as exceeding the power of Congress under Article I, Section 8, of the Constitution to pass laws regulating commerce between the several states insofar as the 1973 Act provides for divestment of creditor liens, mandatory reorganization by consolidation, and

other features which require exercise of the sovereign's power of eminent domain.

4. That said Court, after hearing on motion for Summary Judgment or trial as may be deemed appropriate, enter an order of permanent injunction restraining each of the defendants from proceeding to take any of the actions or exercise any of the functions provided for in the 1973 Act; and enjoining each of the defendants from commencing or continuing proceedings before the Special Court referred in Section 209 of the 1973 Act to the extent the same would be inconsistent with the findings and legal conclusions of said Court.

5. That said Court grant such other and further relief as it may deem appropriate.

Dated: January 25, 1973

Richard Joyce Smith,
Trustee of the property of
The New York, New Haven
and Hartford Railroad Company, Debtor, Plaintiff

By his attorneys

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF ALL DEFENDANTS

Defendants for their Answer to the Complaint answer the numbered paragraphs of the Complaint as follows:

1. Defendants admit that the allegations contained in the first and last sentence of paragraph 1 are an accurate generalized description of the contents of the Complaint and of the relief sought. The allegations contained in the second and third sentences of paragraph 1 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants admit that the amount in controversy, if any, is in excess of $10,000, exclusive of interest and costs.

2. The allegations contained in paragraph 2 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

3. Defendants admit the allegations contained in paragraph 3, except that defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence of said paragraph.

4. Defendants admit the allegations contained in paragraph 4.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5.

6. Defendants admit the allegations contained in paragraph 6.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7.

8. The allegations contained in paragraph 8 purport to be summaries or characterizations of the contents or effect of Penn Central Reorganization Court Order No. 546 the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said Order for a full and complete statement thereof.

9. The allegations contained in paragraph 9 purport to be summaries or characterizations of the nature or status of various unspecified proceedings pending before the Interstate Commerce Commission the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to such proceedings for the nature and contents thereof.

10. The allegations contained in paragraph 10 purport to be summaries or characterizations of the contents or effect of the Mortgage (as defined in paragraph 4 of the Complaint) the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said Mortgage for a full and complete statement thereof.

11. Defendants admit the allegations contained in paragraph 11.

12. The allegations contained in paragraph 12 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

13. Defendants admit the allegation contained in paragraph 13.

14. Defendants admit the allegation contained in the first sentence of paragraph 14. The second sentence of paragraph 14 purports to be a summary or characterization of a provision of the Act the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to such provision for a full and complete statement thereof. Defendants admit that the last sentence of paragraph 14 is an accurate general statement of the relief sought in the Complaint and of the grounds alleged in support thereof.

15. The allegations contained in paragraph 15 purport to be a summary or characterization of the contents or effects of provisions of the Act the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to such provisions for full and complete statements thereof; except that defendants admit that the last sentence of paragraph 15 is an accurate general statement of the relief sought in the Complaint and of the grounds alleged in support thereof.

16. Defendants admit the allegations contained in the first sentence of paragraph 16 if the word "federal" as used therein is intended by plaintiff to have the same meaning as "government." The remaining allegations contained in paragraph 16 purport to be a summary or characterization of the contents or effects of provisions of the Act the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to such provisions for full and complete statements thereof; except that the defendants admit that the last sentence of paragraph 16 is an accurate general statement of the relief sought in the Complaint and of the grounds alleged in support thereof.

17. Defendants deny each and every allegation contained in paragraph 17.

18. Defendants deny each and every allegation contained in paragraph 18.

19. Defendants deny each and every allegation contained in paragraph 19.

20. The allegations contained in paragraph 20 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

21. The allegations contained in paragraph 21 purport to be summaries or characterizations of the contents or effects of various statutory provisions or orders the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said statutory provisions and orders for full and complete statements thereof.

22. Defendants admit that the allegations contained in the first sentence of paragraph 22 are an accurate general statement of the relief sought in the "New Haven Trustee's §77(g) Motion," as that term is defined in the Complaint. The remaining allegations contained in paragraph 22 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that it is possible to ascertain at this time which, if any, rail properties of Penn Central Transportation Company (the Penn Central) will be transferred or conveyed to the Consolidated Rail Corporation (the Corporation).

23. The allegations contained in paragraph 23 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

24. Defendants deny each and every allegation of fact, if any, contained in paragraph 24. All other allegations contained in paragraph 24 are conclusions of law which do not require answer and are accordingly neither admitted nor denied; except that defendants specifically deny that the Act is unconstitutional or void as alleged, and except, further, that defendants deny that it is possible to ascertain at this time whether any action will be taken pursuant to the Act which will adversely affect plaintiff's rights, if any.

25. Defendants deny each and every allegation of fact, if any, contained in paragraph 25; except that defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff holds a vested property interest in the form of a lien on property of Penn Central. All other allegations contained in paragraph 25 are conclusions of law which do not require answer and are accordingly neither admitted nor denied; except that defendants deny that it is possible to ascertain at this time whether any action will be taken pursuant to the Act which will adversely affect plaintiff's rights, if any. Defendants further deny that the effect of Section 303 or of any other provision of the Act is to violate plaintiff's rights under the due process clause of the Fifth Amendment to the United States Constitution, or to take plaintiff's property for public use without payment of just compensation, as required by the Fifth Amendment to the United States Constitution.

26. The allegations contained in paragraph 26 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional

and statutory provisions for full and complete statements thereof; except that defendants deny that the Act is unconstitutional as alleged. To the extent that the allegations contained in paragraph 26 may be allegations of fact, defendants deny each and every allegation.

27. The allegations contained in paragraph 27 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Act is unconstitutional as alleged, and except further that defendants deny that it is possible to ascertain at this time whether any action will be taken pursuant to the Act which will adversely affect plaintiff's rights, if any.

28. The allegations contained in paragraph 28 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Corporation is in fact a "governmental proprietory corporation formed solely to advance the public interests of the United States referred to in Section 101 of the 1973 Act," or that any provision of Section 303 of the Act amounts in fact to a taking for public use by an instrumentality of the United States without provision of constitutionally required just compensation.

29. The allegations contained in paragraph 29 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions

the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof. Defendants deny the allegation that the effect of Section 303(b) or of any other provision of the Act is in fact the same as if Congress had condemned any or all existing mortgage liens upon the rail properties designated in the final system plan. Defendants further deny that it is possible to ascertain at the present time which rail properties will be designated in the final system plan.

30. The allegations contained in paragraph 30 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny plaintiff does not have an adequate remedy at law for damages, if any, against the United States.

31. The allegations contained in paragraph 31 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny each and every allegation contained in the last two sentences of paragraph 31. To the extent that the allegations contained in paragraph 31 are allegations of fact, defendant denies each and every allegation.

32. The allegations contained in paragraph 32 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions

the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said statutory provisions for full and complete statements thereof; except that defendants deny each and every allegation contained in the third sentence of paragraph 32.

33. Defendants deny each and every allegation contained in paragraph 33 to the extent that it is an allegation of fact. In all other respects, if any, said allegations purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Act, alone or in conjunction with the first sentence of Section 77(j) of the Bankruptcy Act, deprives plaintiff of any rights under the Fifth Amendment to the United States Constitution.

34. The allegations contained in paragraph 34 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Act violates plaintiff's rights under the Fifth Amendment to the United States Constitution or exceeds the constitutional power of Congress to pass "uniform laws on the subject of bankruptcies throughout the United States."

35. To the extent that the allegations contained in paragraph 35 are allegations of fact, each and every allegation is denied. In all other respects, said allegations purport

to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof.

36. The allegations contained in paragraph 36 purport to be summaries or characterizations of the contents or effects of evidence introduced into proceedings, or of various constitutional or statutory provisions or orders, the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions and orders for full and complete statements thereof; except that defendants deny that if enforcement of the Act is not enjoined (i) Penn Central will suffer erosion at the rate of $200 million per year for at least 620 days after enactment of the Act, (ii) Penn Central will suffer a net uncompensated erosion of not less than $263 million during said 620 day period, and (iii) plaintiff will suffer irreparable injury. Defendants further deny that the constitutional issues raised by plaintiff are ripe for adjudication at this time.

37. The allegations contained in paragraph 37 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof.

38. Defendants deny the allegations contained in paragraph 38 that plaintiff lacks an adequate remedy at law, and that plaintiff is entitled to an injunction restraining enforcement of the Act.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter, since this is a judicial proceeding with respect to the final system plan and is required by Section 209(b) of the Act to be consolidated in a single, three-judge district court of the United States (which the Act denominates as the "special court" and which is hereinafter referred to as the Special Court) whose members have been designated, as required, by the Judicial Panel on Multidistrict Litigation by order dated March 1, 1974.

THIRD DEFENSE

This Court should not take jurisdiction of the action, since primary jurisdiction is vested in and comity requires deference to the single-judge United States District Court for the Eastern District of Pennsylvania which has jurisdiction over Penn Central in reorganization and which is required by Section 207(b) of the Act to make findings as to (1) whether the public interest would be better served by a reorganization on an income basis under Section 77 of the Bankruptcy Act (11 U.S.C. §205) rather than by a reorganization under the Act (which finding could result in the discontinuance of any proceedings under the Act concerning the rail properties of Penn Central) and (2) whether the Act provides a process which would be fair and equitable to the estate of Penn Central (an inquiry which would essentially duplicate the inquiry which the Court is asked to make herein).

FOURTH DEFENSE

The action is not yet ripe for adjudication. It is therefore premature and presents no actual case or controversy. Any determination as to the allegations concerning the constitutionality of the Act contained in the Complaint cannot and in any event should not be made except in one or more of certain proceedings required by the Act and by Section 77 of the Bankruptcy Act, including (a) the findings, decisions and orders of reorganization courts and the Special Court under Section 207(b) of the Act, (b) the preparation, adoption and review of a final system plan under Section 207(c) and (d) of the Act, (c) the approval and coming into effect of such plan pursuant to Section 208 of the Act, (d) the findings, determinations and orders of the Special Court under Section 303(c) of the Act relating to the fairness and equitableness of the transfers and conveyances of rail properties pursuant to the plan, and (e) the division among the parties to the reorganization of the transferor railroads of the securities, other benefits and judgments awarded to the estates of those railroads.

FIFTH DEFENSE

Plaintiff is not entitled to declaratory or injunctive relief because Plaintiff has not suffered and is not threatened with any irreparable injury, and plaintiff has adequate remedies at law.

WHEREFORE, having fully answered, defendants pray that the Complaint be dismissed and that they recover their costs and attorneys' fees, and that the Court grant such other relief as may be proper.

Respectfully submitted,

March 11, 1974

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

MOTION FOR LEAVE TO INTERVENE

George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., as Trustees of the property of Penn Central Transportation Company, Debtor, and not individually, 6 Penn Center Plaza Philadelphia, Pa. 19104, 215-594-2139, respectfully move for leave to intervene as parties defendant in this proceeding, and to file the attached Answer.

Applicants' grounds for their motion are fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

Charles A. Horsky

Brice M. Clagett

Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006
293-3300

Attorneys for Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF THE PENN CENTRAL TRUSTEES

1. Defendants George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., (the Trustees) are the Trustees of the property of Penn Central Transportation Company, Debtor, (Penn Central) a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act in proceedings pending in the United States District Court for the Eastern District of Pennsylvania. The Trustees' principal office is in Philadelphia, Pennsylvania.

2. Penn Central is a Class 1 railroad undergoing reorganization pursuant to Section 77 of the Bankruptcy Act and the Trustees own, lease, operate or control rail lines located throughout the region defined in the Regional Rail Reorganization Act of 1973 (the Act). As such, Penn Central and the Trustees are subject to procedures of the Act.

3. As their answer to the complaint herein the Trustees allege as follows:

(a) Admit the allegations of paragraphs 1 through 4, except to allege that the validity, ownership, amount and status of the claim arising from the bonds referred to in paragraph 4 has not been determined and the Trustees reserve all of their rights with respect thereto;

(b) Deny the allegations of paragraph 5;

(c) With respect to the allegations of paragraph 6, refer to the mortgage and the applicable orders of the

Commission and the New Haven Reorganization Court for a true and correct statement of their contents;

(d) With respect to the allegations of paragraph 7, the Trustees lack information or knowledge sufficient to form a belief as to permit an answer;

(e) With respect to the allegations of paragraph 8, admit the New Haven Trustee filed a proof of claim dated as of May 31, 1971, in the Penn Central Reorganization proceeding and refer to that document and to Order No. 546 of the Penn Central Reorganization Court for a true and correct statement of their contents;

(f) Admit the allegation of paragraph 9;

(g) With respect to the allegations of paragraph 10, refer to the mortgage for a true and correct statement of its contents and in further answer allege that under present conditions the indenture trustee may not be able to exercise the remedies provided in the mortgage;

(h) Admit the allegations of paragraph 11;

(i) With respect to the allegations of paragraph 12, refer to Sections 11 and 77(j) of the Bankruptcy Act which speak for themselves;

(j) Admit the allegations of paragraphs 13 through 16;

(k) With respect to the allegations of paragraphs 17 through 19, admit that the Act may have resulted and may result in takings of the Trustees' property but deny that such takings are in violation of the Fifth Amendment to the Constitution of the United States and that there is no adequate remedy at law because of the right to obtain a judgment against the United States in the

Court of Claims pursuant to the Tucker Act (28 U.S.C. §1491) for just compensation for any and all such takings;

(l) Deny the allegations of paragraphs 20 through 23 except to admit that the procedures of the Act may alter the remedies heretofore available to claimants in reorganization proceedings pursuant to Section 77. The Trustees in further answer allege that any alteration by the Act of the remedies heretofore available to plaintiff is not unconstitutional or otherwise contrary to law because of the right to obtain a judgment in the Court of Claims pursuant to the Tucker Act for just compensation for all takings of properties effected by the Act;

(m) Deny the allegations of paragraph 24 and refer to the provisions of the Act which speak for themselves, and in further answer allege that the Act does not impair or preclude the right to obtain a money judgment pursuant to the Tucker Act;

(n) With respect to paragraph 25, admit that the Act may have resulted and may result in takings of the Trustees' property but deny that such takings are in violation of the Fifth Amendment to the Constitution of the United States because of the right to obtain a judgment against the United States in the Court of Claims pursuant to the Tucker Act for just compensation for any and all such takings. Because of the availability of the Tucker Act remedy, the Trustees deny the remaining allegations of paragraph 25;

(o) Because of the availability of the Tucker Act remedy, deny the allegations in paragraph 26 and in further answer allege that there are 23 railroads now in reorganization under §77 of the Bankruptcy Act;

(p) Because of the availability of the Tucker Act remedy, deny the allegations of paragraphs 27 through 29;

(q) Deny the allegations of paragraph 30 because of the right to obtain a judgment against the United States pursuant to the Tucker Act, and in further answer allege that the availability of the Tucker Act remedy provides an appropriate judicial process for determining the just compensation to be paid for the takings resulting from the Act and that the right to obtain a money judgment from the Court of Claims provides adequate assurance that the just compensation so determined will be paid by the United States;

(r) Because of the availability of the Tucker Act remedy, deny the allegations in paragraphs 31 and 32;

(s) Deny the allegations of paragraph 33 except to admit that requiring the Trustees to continue to perform their rail operations at a loss may have resulted in takings of their properties on or before January 2, 1974, and in further answer allege that the Act does not impair or preclude the Trustees' entitlement to a money judgment pursuant to the Tucker Act for any takings which the Court of Claims might find to have resulted from the forced continuation of rail services;

(t) Deny the allegations of paragraphs 34 and 35;

(u) Because of the availability of the Tucker Act remedy, deny the allegations in paragraph 36, and in further answer allege that continuing rail operations will result in further erosion of the Penn Central Estate;

(v) Deny the allegations of paragraph 37 and with reference to section E thereof in further answer

allege that the availability of the Tucker Act remedy provides an appropriate judicial process for determining the just compensation to be paid for the takings resulting from the Act and the right to obtain a money judgment against the United States from the Court of Claims provides adequate assurance that the just compensation so determined will be paid by the United States;

(w) Deny the allegations of paragraph 38, because of the Tucker Act remedy.

4. As a further answer the Trustees assert that they are entitled to bring an action in the Court of Claims pursuant to the Tucker Act for a money judgment against the United States for any inadequacy in the amount or kind of compensation awarded pursuant to the procedures of the Act for the takings of property pursuant to or occasioned by the Act. The entitlement of the Trustees to obtain pursuant to the Tucker Act any money judgment that may be necessary to provide just compensation is not impaired or precluded by any provision of the Act and the availability of the Tucker Act remedy assures that just compensation will be paid for all properties, assets, rights and interests found by the Court of Claims to have been subjected to either a temporary or permanent taking by the Act.

Prayer for Relief

WHEREFORE, the Trustees pray that the Court enter an order dismissing the complaint herein and declaring the Act to be valid because the Trustees are entitled to obtain any money judgment that may be necessary to provide just compensation for the takings occasioned by or pursuant to the Act by means of an action in the Court

of Claims against the United States pursuant to the Tucker Act, and that the Act does not impair or preclude the exercise of that right.

Respectfully submitted,

Charles A. Horsky

Brice M. Clagett

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

AND NOW, this 3rd day of May, 1974, on consideration of the Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, for leave to intervene, it is ORDERED that the aforesaid Motion for leave to intervene is GRANTED.

/s/ John P. Fullam

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STIPULATION OF PLAINTIFF AND DEFENDANTS AS TO FACTUAL MATTERS

It is hereby stipulated and agreed by and among the attorneys for the parties hereto that the facts hereinafter set out are deemed to be true, for purposes of any motion for summary judgment or partial summary judgment made by any party in connection with the above-captioned matter, with the same force and effect as if they had been proved by competent and uncontradicted evidence. This stipulation pertains to the use of the following facts for the aforesaid purposes in this action only and does not constitute agreement as to the accuracy of said facts in any other proceeding, cause, action, matter or context.

IT IS HEREBY STIPULATED AND AGREED:

1. Plaintiff, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor in reorganization under §77 of the Bankruptcy Act ("New Haven Trustee" and "New Haven" respectively) is the registered holder of $34,025,800 principal amount of 5% Divisional Mortgage Bonds ("Bonds") of Penn Central Transportation Company, Debtor in reorganization under §77 of the Bankruptcy Act ("Penn Central"). The New Haven Trustee has filed a Proof of Claim dated as of May 31, 1971, a copy of which is attached as Exhibit B, to a Petition of the Penn Central Trustees dated June 17, 1971, to the Penn Central reorganization court,

Document No. 1372.* Said Proof of Claim has not been adjudicated (see Order No. 546 of the Penn Central Reorganization Court in Bky. 70-347).

2. The Bonds of Penn Central held by Plaintiff are secured by a Divisional Mortgage dated December 31, 1968 from Penn Central to The Fidelity Bank and Joseph F. McDonald, as indenture trustees ("Divisional Mortgage"). The Divisional Mortgage comprises a first lien on certain real estate owned by Penn Central, including land, railroad track and improvements, which is now used by Penn Central in furnishing rail freight services, suburban passenger service, and (under contract with National Railroad Passenger Corporation) inter-city rail passenger service, including *inter alia* such service between the following points: Providence, Rhode Island to the Connecticut/New York State Line; Springfield, Massachusetts to New Haven, Connecticut; and comprises a second lien on certain land, railroad track and improvements in New York, New York.

3. By its Order No. 546, dated December 31, 1971, the Penn Central reorganization court ordered that, pending adjudication of the said Proof of Claim filed by the New Haven Trustee, the New Haven Trustee shall be deemed to have a lien, indeterminate in amount and indeterminate as to priority, upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the New Haven Trustee on December 31, 1968, and remaining in possession of the Penn Central Trustees as of June 11, 1971.

4. It is likely that some of the rail properties of Penn Central subject to the Divisional Mortgage and the

*Document references are to documents of record in reorganization proceedings of Penn Central under §77 of the Bankruptcy Act in the Eastern District of Pennsylvania, Docket No. 70-347.

indeterminate lien and other rail properties not so subject will be designated pursuant to each subsection of §206(c)(i) of the Regional Rail Reorganization Act of 1973 (the "Act") for transfer, sale or conveyance pursuant to §206(d) of the Act in any final system plan made effective under the Act.

5. It will not be possible to ascertain until completion of the planning and approval process required by the Act

(i) which rail properties of Penn Central will be designated for transfer or conveyance to Consolidated Rail Corporation ("CRC");

(ii) the liquidation value of properties designated in the final system plan for transfer to CRC;

(iii) the value of properties designated in the final system plan for transfer to CRC on any basis other than a liquidation basis; or

(iv) the value of the consideration which will be exchanged for properties designated in the final system plan for transfer to CRC.

6. Any rail properties of Penn Central which are transferred or conveyed to CRC pursuant to the final system plan will be transferred or conveyed free and clear of any liens which plaintiff may have on such properties.

7. For the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. [Source - Doc. No. 7224] *

*Where appropriate, for ease of reference, the underlying source of the stipulated fact is indicated.

8. Within the meaning of §207(b) of the Act, Penn Central is not "reorganizable on an income basis within a reasonable period of time under §77 of the Bankruptcy Act."

9. Without taking into account the Act or the implementation of any provision thereof, Penn Central is not able to achieve a successful reorganization as a common carrier within a reasonable period of time under §77 of the Bankruptcy Act.

10. During the period that began June 21, 1970, and ended December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000, as shown in Trustees' Financial Statements for June 22-30, 1970, third quarter 1970, October 1970, November 1970, December 1970, 1971, 1972 and 1973. [Source - Doc. Nos. 256, 431, 630, 786, 1309, 3415, 5224 and 6986]

11. During the period that began June 21, 1970, and ended December 31, 1973,

(i) the Penn Central Trustees expended in operating rail properties approximately $137,500,000 of non-recurring cash items as follows:

Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000
Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from sale of stock of Madison Square Garden Corp.	2,400,000
Proceeds from sale of securities held in Contingent Compensation Fund	6,500,000
TOTAL	$137,500,000

[Source - Doc. No. 7244 (Varallia affidavit, Ex. T-1]

(ii) the Penn Central Trustees expended $2,100,000 in proceeds from sale of mortgaged properties in connection with the Selkirk Yard improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan. [Source - Doc. No. 7244 (Varalli affidavit, Ex. T-1)]

(iii) the Penn Central Trustees expended in operating rail properties approximately $157,000,000 in income derived from Penn Central's non-rail properties as set forth in the analysis attached hereto as Exhibit A.

12. During the period beginning on June 21, 1970, and ending on December 31, 1973, the Penn Central Trustees deferred payment of approximately $241,000,000 in state and local taxes, of which some $44 million to $48 million is allocable to the pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses stipulated in item 10 above. [Source - Doc. No. 7245 (Guest affidavit, p. 5); Tr. pp. 11,162-63,* Stipulation between counsel for Penn Central Trustees and USA, ICC Transcript p. 1497, Letter dated April 1, 1974, from counsel for Penn Central Trustees to Judge Fullam]

13. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred payment of approximately $101,000,000 in rentals on leased line properties. It cannot be determined at this time whether the Penn Central estate has or will have claims against the lessor companies in respect of losses incurred by Penn Central in the operation of the leased lines since bankruptcy that would in any part offset the claim for unpaid rentals, or whether the lessors would

*Tr. references are to the transcript in the above-mentioned Penn Central reorganization proceedings.

have claims against Penn Central in addition to claims for unpaid rent. The deferred leased line rentals are included in the ordinary net losses stipulated in item 10 above. [Source - Doc. No. 7245 (Guest affidavit, p. 9); Tr. pp. 11,263-64, Guest ICC Exh. 23, p. 4, Guest Testimony, ICC Transcript, pp. 1,875-76]

14. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred approximately $104,000,000 in interest on mortgage and collateral trust debt. The foregoing figure does not reflect any accrual of unpaid interest on $300 million principal amount of outstanding notes of Penn Central that are alleged by the holders thereof to be secured by all of the outstanding common stock of the Pennsylvania Company, a matter which has been litigated, and is *sub judice*, in the reorganization court (the so-called "Robinson litigation"). Both the validity of the notes and the interest thereon are involved in the litigation; if interest should be payable, interest on such notes is tied to the prime rate in effect from time to time, and unpaid interest on those notes through May 31, 1973, would have amounted to $57.7 million. It has not yet been determined which issues of bonds and notes are fully secured and therefore entitled to post-bankruptcy interest. The deferred interest on mortgage and collateral trust debt and the $300 million principal amount of notes is included in the ordinary net losses stipulated in item 10 above. [Source - Doc. No. 7245 (Guest affidavit, p. 9), Guest ICC Exhibit 22, p. 7, Guest ICC Exhibit 23, p. 4, ICC Transcript p. 1727].

15. The aggregate principal amount of trustees' certificates issued by the Trustees of Penn Central is $100,000,000.

16. Neither the Penn Central Trustees nor any private non-governmental party to Penn Central's §77 reorganization proceedings has sought reorganization under the Act, by petition or otherwise, except insofar as the trustees' motion for leave to intervene and motion for summary judgment heretofore filed on this and related actions may be deemed to have done so.

Dated: April [filed May 2, 1974]

/s/ Joseph Auerbach (DMS)
Attorney for Plaintiff

/s/ James F. Dausch
Attorney for Defendants United States of America and Brinegar, and for the Interstate Commerce Commission (as to whom the United States of America is named as defendant).

/s/ William R. Perlik
Attorney for Defendant United States Railway Association.

EXHIBIT A

ANALYSIS OF NET "NON-RAIL" INCOME
DETAIL OF COMPILATION

Source ICC Form R1:	Item	June 21 to Dec. 31, 1970	1971	1972	1973
		($ in millions)			
(1973 Line No. Ref.)					
Sched. 300 Line No. 33	Other Income	$26.7	$54.3	$56.5	$60.2
Less Rail Related Items:					
Sched. 300 Line No. 23	A/C 509-Inc. Lse. of R.E.	.1	.4	.3	.3
" " 26	512 Sep. Oper. Prop. Plt.	(Net Below)	.1		-
" " 29	516 Inc. From Skg. Fds.	.8	3.5	3.6	5.2
Total	"Rail Related" Income	.9	4.0	3.9	5.6
	"Non-Rail" Income	25.3	50.3	52.6	54.6
Sched. 300 Line No. 43	Misc. Deductions	10.4	23.0	18.6	21.5
Less Rail Related Items:					
Sched. 300 Line No. 33	A/C 545-Sep. Oper. Prop. Loss	(Net) 1.4	4.2	3.5	4.3
" " 42	551 Misc. (L.V. Impairment)	2.3	8.4*	4.8	4.4
Total	"Rail-Related" Misc. Ded.	3.7	12.6	8.3	8.7
	"Non-Rail" Misc. Ded	6.7	10.4	10.3	12.9
"Non-Rail" Income less "Non-Rail" Misc. Ded.		19.1	39.9	42.3	41.8
Sched. 300 Line No. 4	Tax Allocation Cr.	(4.9)	3.9	7.1	8.0
Net Non-Rail Income		$14.2	$43.8	$49.4	$49.8

*Includes Service Interruption Policy of $3.9 Million

April 15, 1974

[CAPTION]

Stipulation as to the record, dated April 15, 1974

(Identical to the stipulation in the Connecticut General case, item 3h)

[CAPTION]

Affidavit of John W. Ingram, dated May 23, 1974 (as amended by affidavit of May 30, 1974)

(Identical to 3m)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF NEW HAVEN TRUSTEE TO
STRIKE AFFIDAVIT OF JOHN W. INGRAM

Plaintiff Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee"), hereby moves to strike the Affidavit of John W. Ingram (the "Affidavit") on the following grounds:

1. If the Affidavit is submitted in opposition to the New Haven Trustee's Motion for Summary Judgment it should be stricken as being wholly irrelevant to the issues raised by such Motion because whether the proposed Consolidated Rail Corporation ("CRC") is or is not "financially self-sustaining" (Affidavit, ¶2) is not relevant to the contention of the New Haven Trustee that compensation for the railroad properties to be compulsorily transferred to CRC must be solely in money or its perfect equivalent, and that securities of CRC, no matter how valuable, will not be the perfect equivalent of money.

II. If the Affidavit is submitted in support of Defendants' Motion for Summary Judgment, it should be stricken on the ground that it fails to meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure in that it is not "made on personal knowledge", it does not "set forth such facts as would be admissible in evidence", and it does not "show affirmatively that the affiant is competent to testify to the matters stated therein". The Affidavit is on its face inadmissible on the grounds that

it is non-factual, argumentative and conclusory in nature; it relies on non-admissible hearsay; and, if offered as expert testimony, it is unsupported by reference to recognized, competent texts or treatises or to any competent factual compilations or analyses.

Moreover, the Affidavit is inconsistent with the Stipulation of Plaintiff and Defendants as to Factual Matters among all the parties to the proceeding, who stipulated, *inter alia*, that "[i]t will not be possible to ascertain until completion of the planning and approval process required by the [Regional Rail Reorganization] Act [of 1973] . . . the value of the consideration which will be exchanged for properties designated in the final system plan for transfer to CRC."

WHEREFORE, the New Haven Trustee prays that this Court strike the Affidavit of John W. Ingram.

Dated: June 3, 1974

Respectfully submitted,

Of Counsel:

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54 Meadow Street
New Haven, Connecticut
06506

Sullivan & Worcester
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Boston, Massachusetts 02110

Gratz, Tate, Spiegel, Ervin
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Attorneys for Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment in Plaintiff's favor for the relief sought in the Complaint in subparagraphs (c), (d) and (e) of Paragraph 3, and in Paragraph 4, of the prayer for relief, to wit, that the Court declare and adjudge that the Regional Rail Reorganization Act of 1973, Public Law 93-236 (the "1973 Act") is unconstitutional and void, and that the Plaintiff's property rights have been taken or are threatened by a taking for public use without just compensation within the meaning of the Fifth Amendment to the United States Constitution; and that the Court enter an order of permanent injunction restraining each of the defendants from proceeding to take any of the actions or exercise any of the functions provided in the 1973 Act to be taken or exercised by them. The grounds for Plaintiff's Motion is that he is, as a matter of law, entitled to the relief requested, that all material facts which have any bearing upon the issues of law are in the record before this Court pursuant to stipulation among the parties embodying evidence in the proceedings of Penn Central Transportation Company under §77 of the Bankruptcy Act in this District (Bky. No. 70-347), and in proceedings of the Interstate Commerce Commission, Finance Docket No. 26241, and that no genuine issue exists among the parties as to material facts

relevant to a determination of the issues of law presented by this Motion.

2. That this Motion be granted expedited consideration for the reason that the prompt determination of the constitutionality of the 1973 Act is in the national interest as well as the interest of justice, and that irreparable injury is being suffered by the Plaintiff pending adjudication of his Complaint.

3. If summary judgment upon the whole case or for all the relief asked is resisted by any Defendant, and a claim is made that a trial is necessary, that the Court, at the hearing on this Motion, by examining the pleadings and the evidence before it and by interrogating counsel as it may deem appropriate, ascertain whether and, if so, what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and which would permit the Court to proceed on this Motion as one for partial summary judgment, and directing such further proceedings in the action and in this Motion as are just.

Plaintiff's grounds for his Motion are fully set forth in the attached Memorandum of Points and Authorities.

Dated: April 29, 1974

Respectfully submitted,

Of Counsel:

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06506

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF INTERVENING DEFENDANTS FOR SUMMARY JUDGMENT

Intervening defendants, George P. Baker, Robert W. Blanchette, and Richard C. Bond, Trustees of the Property of Penn Central Transportation Company, Debtor, move for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ John B. Rossi, Jr.

John B. Rossi, Jr.
John F. DePodesta
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215–594-1165
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202-293-3300

Attorneys for the Trustees of the property of Penn Central Transportation Company, Debtor

Dated: May 10, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

NOTICE OF MOTION

TO: Joseph Auerbach, Esq.
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John B. Rossi, Esq.
Office of Counsel for the
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888 16th Street, N. W.
Washington, D. C. 20006

PLEASE TAKE NOTICE that on May 24, 1974, Defendants will file with the Clerk of the United States District Court for the Eastern District of Pennsylvania the within Motion for Summary Judgment. In support of said Motion Defendants incorporate by reference the Brief of Defendants in Opposition to Plaintiff's Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, filed in this Action on May 17, 1974.

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

Of Counsel:
RODNEY E. EYSTER
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/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
United States Department of Justice

Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Schultz

Of Counsel:
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Washington, D. C. 20006

/s/ William R. Perlik
WILLIAM R. PERLIK

Attorney for the United States Railway Association

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in their favor on the grounds that there is no genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law. This Motion is based upon the following:

(1) Complaint and Answer;

(2) Stipulation of facts entered into by the parties for the purposes of any motion for summary judgment;

(3) Stipulation of the parties incorporating as part of the record in this Action extracts from the record in *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

(4) The portions of the record described in the preceding paragraph (3) which are cited and relied upon by Defendants in the Brief of Defendants in Opposition to Plaintiff's Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, filed in this Action on May 17, 1974;

(5) Affidavit of Jerome E. Sharfman, dated May 10, 1974;

(6) Northeastern Railroad Problem, A Report to the Congress Submitted by the Secretary of Transportation in Response to S. J. Res. 59-2, dated March 26, 1973; and

(7) Report of Defendant Claude S. Brinegar in his capacity as Secretary of Transportation, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports".

WHEREFORE, defendants pray that this Court enter its judgment dismissing all claims set forth in the Complaint except those claims which rest on allegations that the Regional Rail Reorganization Act of 1973 exceeds the authority of Congress under Article III of the Constitution, said claims being those referred to in paragraphs 3(a) and 3(b) of the prayer for relief of the Complaint.

May 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

Of Counsel:
RODNEY E. EYSTER
General Counsel

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
United States Department of Justice

JEROME E. SHARFMAN
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Attorneys
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Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Schultz

/s/ William R. Perlik
WILLIAM R. PERLIK
Attorney for the United States Railway Association

Of Counsel:
Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006

[CAPTION]

Affidavit of Jerome E. Sharfman, dated May 10, 1974, together with Exhibit A thereof

(Not printed, but appears in the Joint Documentary Submission as Item 60)

DOCKET ENTRIES

in the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

in

Penn Central Company v.
Claude S. Brinegar, et al.

No. C.A. 74-195

(Later transferred to
Eastern District of Pennsylvania,
No. C.A. 74-1149)

Date	Proceedings
1974	
Jan. 29	Complaint, appearance, filed.
Jan. 29	Summons, Copies (6) and Copies (6) of Complaint issued, defts. ser. 2-1-74.
Jan. 29	APPLICATION for convening of Three-Judge District Court; P&A.
Feb. 12	OPPOSITION of deft. #6 to application for convening of Three-Judge Court; attachment; exhibit A; c/m 2-12-74. Appearance of James F. Dausch.
Feb. 22	WITHDRAWAL of the opposition of Deft. #6 to the immediate convening of a three-judge court; exhibit; c/m 2-22-74.
Feb. 25	REQUEST for designation of Three Judge Court. (Del. to USCA) Parker, J.
Mar. 1	DESIGNATION of the Honorable Harold Leventhal, United States Circuit Judge and the Honorable Thomas A. Flannery, United States District Judge, to serve with the Honorable Barrington D. Parker, United States District Judge, as members of a three judge court to hear and determine this case. Wright, Acting Chief Judge, USCA.

1974

Mar. 11	ANSWERS of defts. to complaint; c/m 3-11-74. Appearance of James F. Dausch.
Mar. 11	CALENDARED CD/N.
Mar. 15	APPEARANCE of William R. Perlik, Wilmer, Cutler & Pickering as counsel for Deft. #5. CD/N.
Mar. 18	LETTER dated 3-14-74 re: Answer of Interstate Commerce Commission.
Apr. 3	MOTION by George P. Baker, Robert W. Blanchette, and Richard C. Bond, trustees of the property of Penn Central Transportation Company, debtor, to intervene; exhibit; P&A's; exhibit A; exhibit B; c/s 4-3-74. Deposit $5.00 by Charles Horsky. Appearance of Brice M. Clagett (888 – 16th St., N. W.)
Apr. 12	MOTION of defendants for transfer; plaintiffs consent; memorandum; attachment A.
Apr. 17	ORDER granting motion of deft. to transfer this cause to the Eastern District of Pennsylvania; directing Clerk to effect the transfer. (N) Parker, J.
Apr. 29	ORIGINAL file mailed to Clerk, U.S. District Court for the Eastern District of Pennsylvania pursuant to order of April 17, 1974.
May 9	ACKNOWLEDGMENT of receipt of original file from Eastern District of Pennsylvania.

Proceedings

in the

United States District Court
for the Eastern District of Pennsylvania

No. C.A. 74-1149

Date			Proceedings	Date of Judgment
1974				
1	May	6	Original record and certified copy of docket entries transferred from USDC District of Columbia, filed.	
2	"	16	Order reassigning this case to Judge Fullam, filed. entr. & cys. mailed 5/17/74.	
3	"	16	Order GRANTING motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of Penn Central Trans. Co. to intervene, filed. entr. & cys. mailed 5/17/74.	
4	"	17	Order that summary judgment motions and supporting briefs be filed on or before May 22, 1974, opposing affidavits etc., shall be filed on 5/30/74, etc. and hearing on summary judgment motions will be held on 6/3/74, filed. entr. & cys. mailed 5/21/74.	
5	"	20	Motion of intervening defts. for summary judgment, memorandum in support and certificate of service, filed.	
6	"	22	Plff's. motion for summary judgment and memorandum in support, filed.	
7	"	29	Brief of intervening defts. in opposition to plff's. motion for summary judgment, filed.	
8	"	30	Defts'. brief in opposition to plff's. motion for summary judgment and memorandum in support and in partial opposition to intervening deft's. motion for summary judgment, filed.	
9	"	30	Deft's. incorporation of brief by reference, filed.	

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10	"	30	Submission of affidavit of John P. Ingram in compliance with ¶2 of Order of 5/17/74, filed.
11	"	30	Affidavit of John W. Ingram, filed.
12	"	30	Joint documentary submission of plffs., defts. and intervening defts., filed.
13	"	30	Plff's. memorandum in opposition to defts. motions for summary judgment, filed.
14	"	31	Defts'. motion for summary judgment, notice of motion, filed.
15	"	31	Suppl. joint documentary submission of plffs., defts. and intervening defts., filed.
	Jun.	3	Arg. re: Plff's. motion for summary judgment and deft's. and intervening defts'. motion for summary judgment, C.A.V.
16	"	4	Stipulation as to the record in this proceeding, filed.
17	"	4	Stipulation as to factual matters, filed.
–	"	6	Transcript of 6/3/74, filed. (C.A. #74-189).
18	"	25	Copy of Opinion and Order, ALDISERT, CJ., FULLAM, J. and BECHTLE, J. enjoining U.S. Railway System from certifying a Final System Plan to Special Court, etc., Enjoining defts. from taking any action to enforce provisions of Sec. 304(f) of the RRRA with respect to abandonment, etc.; enjoining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization under §77 of the Bankruptcy Act, entering Declaratory judgment that Sec. 303 of RRRA is null and void as contravening the Fifth Amendment, etc.; Sec. 304(f) of the RRRA is null and void as violative of the Fifth Amendment, etc.; that Sec. 207(b) of RRRA as requires reorganization courts to dismiss pending bankruptcy proceedings as violative of Art. I Sec. 8 Clause 4 of the Constitution; plffs. motions for partial summary judgment are granted in part and in all other respects denied; defts. motions for summary judgment are denied, filed. cys. to all parties 6/25/74 – entered 6/26/74.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

COMPLAINT

ACTION UNDER THE CONSTITUTION OF THE UNITED STATES REQUESTING THE DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

JURISDICTION, VENUE AND NATURE OF ACTION

1. This Court has jurisdiction of the action pursuant to Title 28 U.S.C. §§1331(a), 1337, 2201, 2202, 2282, 2284 and 1651. The amount in controversy exceeds $10,000 exclusive of interest and costs.

2. Venue over this action lies in the District of Columbia pursuant to 28 U.S.C. §1391(b) and (e). All defendants reside in the District of Columbia, the claim arises in the District of Columbia, each defendant is an officer or employee of the United States or an agent thereof, acting in his official capacity, or an agency of the United States, and real property involved in this action is situated in the District of Columbia.

3. Plaintiff brings this action seeking a declaratory judgment from the Court that the Regional Rail Reorganization Act of 1973, Public Law 93-236 (hereinafter the "Act"), is in contravention of the Constitution of the United States, and seeking the issuance of relief by way of permanent injunction and/or such other relief as the Court deems appropriate.

4. Plaintiff requests determination of this action by a three-judge court pursuant to Title 28 U.S.C. §§2282 and

2284. This is a proper case for determination by a three-judge court as plaintiff seeks a permanent injunction restraining the enforcement, operation, and execution of the Act as violative of the United States Constitution.

PARTIES

5. Plaintiff, Penn Central Company, is a Pennsylvania Corporation with its principle place of business in Philadelphia, Pennsylvania. Plaintiff is the parent company of Penn Central Transportation Company (hereinafter "P.C.T.C.") owning 100% of the stock of PCTC. Plaintiff is also a creditor of PCTC in the approximate amount of $43 million.

6. (a) Defendant Claude S. Brinegar is Secretary of Transportation of the United States, an incorporator of the United States Railway Association, and a member of the Board of Directors of the Association, and is sued herein in each of these capacities.

(b) Defendant George M. Stafford is Chairman of the Interstate Commerce Commission, an incorporator of the United States Railway Association, and a member of the Board of Directors of the Association, and is sued herein in each of these capacities.

(c) Defendant George P. Shultz is Secretary of the Treasury of the United States, an incorporator of the United States Railway Association, and a member of the Board of Directors of the Association, and is sued herein in each of these capacities.

(d) The defendant United States Railway Association is a governmental corporation of defendant United States of America established in the District of Columbia by Section 201 of the Act.

(e) The defendant Interstate Commerce Commission is an agency of the defendant United States of America. The Rail Services Planning Office established pursuant to Section 205 (a) of the Act is an office of the defendant Commission.

BACKGROUND OF THIS ACTION

7. On June 21, 1970, PCTC filed a petition for reorganization pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. §205, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 70-347.

8. This Act became law on January 2, 1974.

9. PCTC owns, leases, and/or operates approximately 19,850 miles of railroad.

10. PCTC is a railroad within the meaning of the Interstate Commerce Act, 49 U.S.C. §1(3), and under the provisions of the Act, Section 102(11).

11. PCTC is a "railroad in reorganization" pursuant to Section 102(12) of the Act and is a railroad doing business in the "region" as defined in Section 102(13) of the Act.

12. There are approximately 27,350 total miles of railroad owned, leased, and/or operated by "railroads in reorganization" in the "region" as defined in the Act. Approximately 73% of this total is owned, leased, and/or operated by PCTC.

13. This Act applies only to "railroads in reorganization" in the "region" as defined in Sections 102(12) and 102(13) of the Act, and not to other railroads in

the United States or to other "railroads in reorganization" outside of these defined regions.

14. Within 30 days of the enactment of this Act, the Secretary of Transportation, pursuant to Section 204(a) of the Act, is directed to prepare a report containing his conclusions and recommendations with respect to the geographic zones within the region in and between which rail service should be provided and the criteria upon which such conclusions and recommendations are based.

15. Pursuant to Section 205(d) (1) of the Act, the Rail Services Planning Office, an office of the Interstate Commerce Commission, is directed to study and evaluate the Secretary of Transportation's §204(a) report and to submit its report thereon to the United States Railway Association within 120 days after the date of enactment of the Act.

16. The United States Railway Association, established by the Act, is authorized, in Sections 202, 207 and 208, to prepare and implement a "final system plan," the purpose of which is to create, through a process of reorganization of the "railroads in reorganization," a self-sustaining rail service system in the "region" adequate to meet the needs, *inter alia*, of commerce, national defense, environment, passenger service, shippers, states, and consumers in the "region."

17. Pursuant to Section 207(b) of the Act, within 120 days after enactment of the Act, each United States district court having jurisdiction over a "railroad in reorganization" in the "region" must decide whether the railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act.

18. Pursuant to Section 207(b) of the Act, within 60 days after the issuance of the Report of the Rail Services Planning Office, outlined in paragraph 15 above, each Court having jurisdiction over a "railroad in reorganization" shall decide whether such railroad shall be reorganized pursuant to the Act. Section 207(b) states that each reorganization court shall order that the reorganization of the railroad under its jurisdiction shall proceed pursuant to the Act unless the Court (1) has found that the railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by a reorganization under the Act, or (2) finds that the Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization, in which case it shall dismiss the reorganization proceedings.

19. The final system plan will designate certain "rail properties" of the "railroads in reorganization" and of those railroads leased, operated or controlled by such railroads in the "region," which are to be transferred thereafter to the Consolidated Rail Corporation, established in Section 301 of the Act, a corporation which is an instrumentality and agency of the United States government, and certain "rail properties" which will be offered for sale thereafter to "profitable railroads" as defined in Section 102(9) of the Act.

20. By reason of the provisions of the Act, as designated above, rail properties of PCTC will be transferred to the Consolidated Rail Corporation and/or sold.

21. Under the Act, the "final system plan" will be adopted and rail properties of PCTC transferred and/or sold without the consent or approval of plaintiff, and

any other creditor or lienholder, and without the consent or approval of any court with jurisdiction over the railroad's property. Plaintiff will thus be deprived of its property without having any choice, control or participation in its disposition.

22. PCTC is and has been since at least February 8, 1973, operating its railroad properties, in the public interest, at continuing losses, and continuation of such operation will increase such losses.

23. The Act contains no provision or authorization for payment of compensation to PCTC or to plaintiff for the forced continuation of rail services.

CAUSE OF ACTION

24. The Act and its various provisions violate on their face and are in contravention of the Constitution of the United States as applied or as applicable to plaintiff Penn Central Company, are inconsistent with the letter and spirit of the Constitution of the United States, and deny and abridge the constitutional rights of the plaintiff, *inter alia*, in the following manner:

(A) The Act is unconstitutional in that it is violative of the express provisions of the Fifth Amendment to the United States Constitution in the following respects:

(1) it provides for the taking by the United States of the private property of the plaintiff for a public use without the payment of just compensation;

(2) it provides for the continued taking by the United States of the private property of the plaintiff for public

use during the implementation of the Act without the concomitant payment of just compensation;

(3) it denies to plaintiff the payment of just compensation for the taking by the United States of private property of the plaintiff for public use which occurred prior to the enactment of the Act.

(B) The Act is unconstitutional in that its application is limited to those entities, regions, and periods of time which are defined therein, and thereby is violative of the requirements of Art. I, Section 8, Clause 4 of the Constitution of the United States that Congress enact uniform laws on the subject of bankruptcies throughout the United States.

(C) The Act is unconstitutional in that it improperly circumscribes, limits, and denies to the plaintiffs access to the courts and judicial review; and furthermore, improperly circumscribes the scope of such judicial review as is granted under the Act, all in violation of the plaintiff's right to due process as guaranteed by the Fifth Amendment to the United States Constitution and in violation of the provisions of Article III, Sections 1 and 2 of the United States Constitution.

(D) The Act is unconstitutional in that it expressly forecloses judicial review of numerous provisions of, and actions which are to be carried out pursuant to the Act in violation of Article III, Section 2 of the United States Constitution.

(E) The Act is unconstitutional in that the provisions of the Act are, in numerous instances, vague and unintelligible and, thereby, denies the rights guranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

(F) The Act is unconstitutional in that numerous provisions thereof improperly and illegally delegate certain powers vested by the Constitution in the Congress of the United States to other branches of government and, in particular, to the judicial branch of the United States Government, all in violation of Article I, Section 1 of the United States Constitution.

(G) The Act is unconstitutional in that its provisions illegally remove certain powers vested by the Constitution in the judicial branch of the United States Government to other branches of the Government and, in particular, to the Congress of the United States, all in violation of Article III, Section 2 of the United States Constitution.

(H) The Act is unconstitutional in that it establishes procedures which, *inter alia*, limit the manner in which the rights of the plaintiff are to be determined, limit the manner in which the interests of the public under the Act are to be determined, and limit the manner in which the transfer or conveyance of railroad properties under the Act are to be determined, all in violation of the plaintiff's right to due process as guaranteed by the Fifth Amendment to the United States Constitution.

25. By reason of the facts alleged in paragraphs 7 through 24, and by actions already taken and required to be taken by the defendants pursuant to the Act, plaintiff, PCTC and others have been and will be irreparably injured by the Act's abridgement of their constitutional rights. Plaintiff has no other remedy at law and can be accorded full satisfaction only by a judgment of this Court granting the relief requested.

WHEREFORE, Plaintiff prays that a three-judge court be commenced and that such court:

1. Enter a decree declaring the Regional Rail Reorganization Act of 1973, or such provisions thereof, in violation of the Constitution of the United States;

2. Permanently enjoin and prohibit the defendants from enforcing and implementing or attempting to enforce and implement the Act or any provisions thereof;

3. Grant such other and further relief as the Court may deem just, proper and necessary, together with the costs and disbursements of this action.

/s/ David Berger

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Gerald J. Rodos
Michael K. Simon
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and

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Attorneys for Plaintiff

OF COUNSEL:
David Berger, P.A.,
Attorneys-At-Law

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF ALL DEFENDANTS

Defendants for their Answer to the Complaint answer the numbered paragraphs of the Complaint as follows:

1. The allegations contained in paragraph 1 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants admit that the amount in controversy, if any, exceeds $10,000 exclusive of interest and costs.

2. The allegations contained in paragraph 2 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

3. Defendants admit that the allegations contained in paragraph 3 are a correct generalized description of the contents of the Complaint.

4. Defendants deny each and every allegation contained in paragraph 4, except that defendants admit that plaintiff seeks from a three-judge court, among other things, the issuance of a permanent injunction restraining the enforcement, operation and execution of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236 (the Act), for repugnance to the Constitution of the United States.

5. Defendants admit that plaintiff Penn Central Company is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a

belief as to the truth of the remaining allegations of paragraph 5.

6. Defendants:

(a) admit the allegations contained in paragraph 6(a).

(b) admit the allegations contained in paragraph 6(b).

(c) admit the allegations contained in paragraph 6(c).

(d) admit the allegations contained in paragraph 6(d).

(e) admit the allegations contained in paragraph 6(e).

7. Defendants admit the allegations contained in paragraph 7.

8. Defendants admit the allegations contained in paragraph 8.

9. Defendants admit the allegations contained in paragraph 9.

10. Defendants admit the allegations contained in paragraph 10.

11. Defendants admit the allegations contained in paragraph 11.

12. Defendants admit the allegations contained in paragraph 12.

13. The allegations contained in paragraph 13 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

14. The allegations contained in paragraph 14 purport to be a summary or characterization of the contents or effect of a provision of the Act the accuracy of which

is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

15. The allegations contained in paragraph 15 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

16. The allegations contained in paragraph 16 purport to be a summary of or characterization of the contents or effect of a provision of the Act the accuracy of which is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

17. The allegations contained in paragraph 17 purport to be a summary or characterization of the contents or effect of a provision of the Act the accuracy of which is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

18. The allegations contained in paragraph 18 purport to be a summary or characterization of the contents or effect of a provision of the Act the accuracy of which is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

19. The allegations of paragraph 19 consist in part of conclusions of law which do not require answer and are accordingly neither admitted nor denied and is part of a summary or characterization of the contents or effect of provisions of the Act the accuracy of which is neither admitted nor denied and as to which the Court is respectfully referred to the Act for a full and complete statement thereof.

20. Defendants deny that it is possible to determine at the present time which rail properties of Penn Central Transportation Company, if any, will be transferred to the Consolidated Rail Corporation and/or sold.

21. The allegations contained in paragraph 21 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that (i) the final system plan will necessarily designate rail properties of Penn Central Transportation Company, (ii) rail properties of Penn Central Transportation Company will necessarily be transferred or conveyed pursuant thereto, or (iii) the transfer or conveyance, if any, of rail properties of Penn Central Transportation Company pursuant to the final system plan will be done without the approval, consent, option or choice of any court having jurisdiction or power to take any such action wtih respect to any such properties.

22. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22.

23. The allegations contained in paragraph 23 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

24. Defendants deny each and every allegation contained in paragraph 24 to the extent that it is an allegation of fact. To the extent that any allegation contained in paragraph 24 is not an allegation of fact, it is a conclusion of law which does not require answer and is accordingly neither admitted nor denied.

25. Defendants deny the allegations contained in paragraph 25 that plaintiff is faced with irreparable injury, or that plaintiff has no other remedy at law. To the extent that the remaining allegations contained in paragraph 25

are allegations of fact, defendants deny each and every allegation. To the extent that the remaining allegations contained in paragraph 25 are conclusions of law, they do not require answer and are accordingly neither admitted nor denied.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter, since this is a judicial proceeding with respect to the final system plan and is required by Section 209 (b) of the Act to be consolidated in a single, three-judge district court of the United States (which the Act denominates as the "special court" and which is referred to elsewhere in this Answer as the Special Court) whose members are to be designated by the Judicial Panel on Multidistrict Litigation.

THIRD DEFENSE

This Court should not take jurisdiction of the action, since primary jurisdiction is vested in and comity requires deference to those single-judge United States District Court which has jurisdiction over the Penn Central Transportation Company is reorganization and which is required by Section 207(b) of the Act to make findings as to (1) whether the public interest would be served by a reorganization on an income basis under Section 77 of the Bankruptcy Act (11 U.S.C. §205) rather than by a

reorganization under the Act (which finding could result in the discontinuance of any proceedings under the Act concerning the rail properties of the Penn Central Transportation Company) and (2) whether the Act provides a process which would be fair and equitable to the estate of the Penn Central Transportation Company (an inquiry which would essentially duplicate the inquiry which this Court is asked to make herein).

FOURTH DEFENSE

The action is not yet ripe for adjudication. It therefore is premature and presents no actual case or controversy. Any determination as to the allegations concerning the constitutionality of the Act contained in the Complaint cannot and in any event should not be made except in one or more of certain pending or future proceedings required by the Act and by Section 77 of the Bankruptcy Act, including (a) the findings, decisions and orders of reorganization courts and the Special Court under Section 207(b) of the Act, (b) the preparation, a adoption and review of a final system plan under Section 207(c) and (d) of the Act, (c) the approval and coming in effect of such plan pursuant to Section 208 of the Act, (d) the findings, determinations and orders of the Special Court under Section 303(c) of the Act relating to the fairness and equitableness of the transfers and conveyances of rail properties pursuant to the plan, and (e) the division among the parties to the reorganizations of the transferor railroads of the securities, other benefits and judgments awarded to the estates of those railroads.

FIFTH DEFENSE

Plaintiff is not entitled to declaratory or injunctive relief becuse it has not suffered and is not threatened with any irreparable injury, and plaintiff has adequate remedies at law.

WHEREFORE, having fully answered, defendants pray that the Complaint be dismissed and that they recover their costs and attorneys' fees, and that the Court grant such other relief as may be proper.

Respectfully submitted,

Dated: March 6, 1974

IRVING JAFFE
Acting Assistant Attorney General

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United States Attorney

DAVID J. ANDERSON
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Attorneys for the United States Railway Association

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

MOTION FOR LEAVE TO INTERVENE

George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, and not individually, 6 Penn Center Plaza, Philadelphia, Pa. 19104, 215-594-2139, respectfully move for leave to intervene as parties defendant in this proceeding, and to file the attached Answer.

Applicants' grounds for their motion are fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

/s/ Charles A. Horsky
CHARLES A. HORSKY

/s/ Brice M. Clagett
BRICE M. CLAGETT
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Paul R. Duke
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Philadelphia, Pa. 19107

Attorneys for Intervenors

April 3, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF THE
PENN CENTRAL TRUSTEES

1. Defendants George P. Baker, Robert W. Blanchette and Richard C. Bond (the Trustees) are the Trustees of the property of Penn Central Transportation Company, Debtor, (Penn Central) a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act in proceedings pending in the United States District Court for the Eastern District of Pennsylvania. The Trustees' principal office is in Philadelphia, Pennsylvania.

2. Penn Central is a Class 1 railroad undergoing reorganization pursuant to Section 77 of the Bankruptcy Act and the Trustees own, lease, operate or control rail lines located throughout the region defined in the Regional Rail Reorganization Act of 1973 (the Act). As such, Penn Central and the Trustees are subject to procedures of the Act.

3. As their answer to the complaint herein the Trustees allege as follows:

(a) Admit the allegations of paragraphs 1 through 9, except to deny the allegation in paragraph 5 that plaintiff is a creditor of Penn Central in the approximate amount of $43 million;

(b) With respect to the allegations of paragraph 10, admit that Penn Central is a common carrier within the meaning of § 1(3) of the Interstate Commerce

Act and is a railroad as defined in § 102(11) of the Act;

(c) Admit the allegations of paragraph 11 except to allege that at this time Penn Central is "a railroad in reorganization" only for the purposes of Section 207(b), and may as a result of the determinations to be made pursuant to that section become "a railroad in reorganization" as defined in Section 102(12) of the Act;

(d) Admit the allegations of paragraph 12;

(e) With respect to the allegations of paragraph 13, admit that the Act applies to railroads in reorganization in the region as defined in §§ 102(12) and 102(13) thereof, but deny that it may not apply to other railroads as well;

(f) Admit the allegations of paragraphs 14 through 19 except refer to the Act for a true and correct statement of its terms;

(g) With respect to the allegations of paragraphs 20 and 21, refer to the provisions of the Act which speak for themselves;

(h) Admit the allegations of paragraphs 22 and 23 and in further answer allege that the Trustees have been compelled to continue operating their rail properties in the public interest at heavy losses and that the Trustees are entitled to a money judgment pursuant to the Tucker Act for any takings the Court of Claims might find resulted from such forced continuation of rail services.

(i) With respect to Section A of paragraph 24, admit that the Act may have resulted and may result

in takings of the Trustees' property but deny that such takings are in violation of the Fifth Amendment to the Constitution of the United States because of the right to obtain a judgment against the United States in the Court of Claims pursuant to the Tucker Act for just compensation for any and all such takings. Because of the availability of the Tucker Act remedy, the Trustees deny the allegations of Sections (B) through (H) of paragraph 24.

(j) Because of the availability of the Tucker Act remedy, deny the allegations of paragraph 25.

4. As a further answer the Trustees assert that they are entitled to bring an action in the Court of Claims pursuant to the Tucker Act for a money judgment against the United States for any inadequacy in the amount or kind of compensation awarded pursuant to the procedures of the Act for the takings of property pursuant to or occasioned by the Act. The entitlement of the Trustees to obtain pursuant to the Tucker Act any money judgment that may be necessary to provide just compensation is not impaired or precluded by any provision of the Act and the availability of the Tucker Act remedy assures that just compensation will be paid for all properties, assets, rights and interests found by the Court of Claims to have been subjected to either a temporary or permanent taking by the Act.

Prayer for Relief

WHEREFORE, the Trustees pray that the Court enter an order dismissing the complaint herein and declaring the Act to be valid because the Trustees are entitled to obtain any money judgment that may be necessary to provide just compensation for the takings pursuant to

the Act by means of an action in the Court of Claims against the United States pursuant to the Tucker Act, and that the Act does not impair or preclude the Trustees' exercise of that right.

Respectfully submitted,

/s/ Charles A. Horsky
Charles A. Horsky

/s/ Brice M. Clagett
Brice M. Clagett
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Paul R. Duke
General Counsel
Penn Central Transportation Company
Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Intervenors

April 3, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

Affidavit of John W. Ingram,
dated May 23, 1974 (as amended)

(Identical to the affidavit
in Connecticut General case,
item 3m)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

AND NOW, this 16th day of May, 1974, on consideration of the Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, for leave to intervene, it is ORDERED that the aforesaid Motion for leave to intervene is GRANTED.

/s/ John P. Fullam
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF PLAINTIFF PENN CENTRAL COMPANY FOR SUMMARY JUDGMENT

Plaintiff, Penn Central Company, hereby moves this Honorable Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and submits in support of this motion the attached memorandum of law.

/s/ David Berger
David Berger
Gerald Jay Rodos
Paul J. McMahon
Edward Rubenstone
1622 Locust Street
Philadelphia, PA 19103

Attorneys for Plaintiff
Penn Central Company

OF COUNSEL:

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1622 Locust Street
Philadelphia, PA 19103

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF INTERVENING DEFENDANTS
FOR SUMMARY JUDGMENT

Intervening defendants, George P. Baker, Robert W. Blanchette and Richard C. Bond, Trustees of the Property of Penn Central Transportation Company, Debtor, move for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ John B. Rossi, Jr.
John B. Rossi, Jr.
John F. DePodesta
1836 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104
215-594-1165

Charles A. Horsky
Brice M. Clagett
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-293-3300

Attorneys for the Trustees of
the property of Penn Central
Transportation Company, Debtor

Dated: May 20, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in their favor on the grounds that there is no genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law. This Motion is based upon the following:

(1) Complaint and Answer;

(2) Any stipulation of facts entered into by the parties for the purposes of any motion for summary judgment;

(3) Any stipulation of the parties incorporating as part of the record in this Action extracts from the record in *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

(4) The portions of the record described in the preceding paragraph (3) which are cited and relied upon by Defendants in the Brief of Defendants in Opposition to Plaintiffs' Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, to be filed in this Action on or before May 30, 1974;

(5) Affidavit of Jerome E. Sharfman, dated May 10, 1974;

(6) Affidavit of John P. Ingram, dated May 23, 1974;

(7) Northeastern Railroad Problem, a Report to the Congress Submitted by the Secretary of Transportation in Response to S. J. Res. 59-2, dated March 26, 1973; and

(8) Report of Defendant Claude S. Brinegar in his capacity as Secretary of Transportation, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports."

WHEREFORE, Defendants pray that this Court enter its judgment in favor of the Defendants and dismissing this Action.

May 31, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch (IS)
JAMES F. DAUSCH
Attorney
United States Department of Justice

Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Shultz

Of Counsel:
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Washington, D.C. 20590

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Washington, D.C. 20006

Of Counsel: /s/ William R. Perlik
WILLIAM R. PERLIK
Attorney for the United States Railway Association

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

Stipulation as to the record, dated April 15, 1974

(Identical to the stipulation in the Connecticut General case, item 3h)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STIPULATION OF PLAINTIFF AND DEFENDANTS AS TO FACTUAL MATTERS

It is hereby stipulated and agreed by and among the attorneys for the parties hereto that the facts hereinafter set out are deemed to be true, solely for purposes of any motion for summary judgment or partial summary judgment made by any party in connection with the above-captioned matter, with the same force and effect as if they had been proved by competent and uncontradicted evidence. This stipulation pertains to the use of the following facts for the aforesaid purposes in this action only and does not constitute agreement as to the accuracy of said facts in any other proceeding, cause, action, matter or context.

IT IS HEREBY STIPULATED AND AGREED:

1. Plaintiff, Penn Central Company, is the sole stockholder of Penn Central Transportation Company ("Debtor" or "Penn Central") in reorganization under Section 77 of the Bankruptcy Act owing 100% of the stock of the Debtor.

2. Plaintiff is an unsecured creditor of the Debtor in the approximate amount of $41,800,000.

3. It is likely that some of the rail properties of the Debtor will be designated pursuant to each subsection of Section 206(c)(i) of the Regional Rail Reorganization Act

of 1973 (the "Act") for transfer, sale or conveyance pursuant to Section 206(d) of the Act in any final system plan made effective under the Act.

4. It will not be possible to ascertain until completion of the planning and approval process required by the Act.

(i) which rail properties of Penn Central will be designated for transfer or conveyance to Consolidated Rail Corporation ("CRC");

(ii) the liquidation value of properties designated in the final system plan for transfer to CRC;

(iii) the value of properties designated in the final system plan for transfer to CRC on any basis other than a liquidation basis; or

(iv) the value of the consideration which will be exchanged for properties designated in the final system plan for transfer to CRC.

5. Any rail properties of Penn Central which are transferred or conveyed to CRC pursuant to the final system plan will be transferred or conveyed free and clear of any liens.

6. For the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. [Source - Doc. No. 7224] *

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*Where appropriate, for ease of reference, the underlying source of the stipulated fact is indicated.

7. Within the meaning of §207(b) of the Act, Penn Central is not "reorganizable on an income basis within a reasonable period of time under §77 of the Bankruptcy Act."

8. Without taking into account the Act or the implementation of any provision thereof, Penn Central is not able to achieve a successful reorganization as a common carrier within a reasonable period of time under §77 of the Bankruptcy Act.

9. During the period that began June 21, 1970, and ended December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000, as shown in Trustees' Financial Statements for June 22-30, 1970, third quarter 1970, October 1970, November 1970, December 1970, 1971, 1972, and 1973. [Source - Doc. Nos. 256, 431, 630, 786, 1309, 3415, 5224 and 6986].

10. During the period that began June 21, 1970, and ended December 31, 1973,

(i) the Penn Central Trustees expended in operating rail properties approximately $137,500,000 of non-recurring cash items as follows:

Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000
Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from sale of stock of Madison Square Garden Corp.	2,400,000
Proceeds from sale of securities held in Contingent Compensation Fund	6,500,000
TOTAL	$137,500,000

[Source - Doc. No. 7244 (Varalli Aff., Ex. T-1)]

(ii) the Penn Central Trustees expended $2,100,000 in proceeds from sale of mortgaged properties in connection with the Selkirk Yard improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan. [Source - Doc. No. 7244 (Varalli Aff., Ex. T-1]

(iii) the Penn Central Trustees expended in operating rail properties approximately $157,000,000 in income derived from Penn Central's non-rail properties as set forth in the analysis attached hereto as Exhibit A.

11. During the period beginning on June 21, 1970, and ending on December 31, 1973, the Penn Central Trustees deferred payment of approximately $241,000,000 in state and local taxes, of which some $44 million to $48 million is allocable to the pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses stipulated in item 9 above. [Source - Doc. No. 7245 (Guest Aff., p. 5); Tr. pp. 11,162-63,* Stipulation between counsel for Penn Central Trustees and USA, ICC Transcript p. 1497, Letter dated April 1, 1974, from counsel for Penn Central Trustees to Judge Fullam].

12. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred payment of approximately $101,000,000 in rentals on leased line properties. It cannot be determined at this time whether the Penn Central estate has or will have claims against the lessor companies in respect of losses incurred by Penn Central in the operation of the leased lines since bankruptcy that would in any part offset the claim for unpaid rentals or whether the lessors would have claims against Penn Central in addition to claims for

*Tr. references are to the transcript in the above-mentioned Penn Central reorganization proceedings.

unpaid rent. The deferred leased line rentals are included in the ordinary net losses stipulated in item 9 above. [Source - Doc. No. 7245 (Guest Aff., p. 9); Tr. pp. 11,263-64, Guest ICC Exh. 23, p. 4, Guest Testimony, ICC Transcript, pp. 1,875-76].

13. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred approximately $104,000,000 in interest on mortgage and collateral trust debt. The foregoing figure does not reflect any accrual of unpaid interest on $300 million principal amount of outstanding notes of Penn Central that are alleged by the holders thereof to be secured by all of the outstanding common stock of the Pennsylvania Company, a matter which has been litigated, and is *sub judice*, in the reorganization court (the so-called "Robinson litigation"). Both the validity of the notes and the interest thereon are involved in the litigation; if interest should be payable, interest on such notes is tied to the prime rate in effect from time to time, and unpaid interest on those notes through May 31, 1973, would have amounted to $57.7 million. It has not yet been determined which issues of bonds and notes are fully secured and therefore entitled to post-bankruptcy interest. The deferred interest on mortgage and collateral trust debt and the $300 million principal amount of notes is included in the ordinary net losses stipulated in item 9 above. [Source - Doc. No. 7245 (Guest Aff., p. 9), Guest ICC Exhibit 22, p. 7, Guest ICC Exhibit 23, p. 4, ICC Transcript p. 1727].

14. The aggregate principal amount of trustees' certificates issued by the Trustees of Penn Central is $100,000,000.

15. Neither the Penn Central Trustees nor the Plaintiff herein has sought reorganization under the Act, by petition

or otherwise, except insofar as the Trustees' motion for leave to intervene and motion for summary judgment heretofore filed on this and related actions may be deemed to have done so.

/s/ David Berger
Attorney for Plaintiff

/s/ James Dausch
Attorney for Defendants

/s/ William R. Perlik
Attorney for Defendant United States Railway Association.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

SUPPLEMENTARY JOINT DOCUMENTARY SUBMISSION OF PLAINTIFFS, DEFENDANTS AND INTERVENING DEFENDANTS

In addition to the Joint Documentary Submission filed May 30, 1974 in this action, the parties hereby submit the following documents:

(1) The Petition of Penn Central Company for Termination Of Rail Operations And Severance Of Rail Properties From Non-Rail Properties. (Exhibit A)

(2) Pages 12,303-12,304, Transcript of May 6, 1974 Hearing in this Penn Central Reorganization proceeding. (Exhibit B)

/s/ David Berger
David Berger
Attorney for plaintiff
and
Lloyd N. Cutler
Attorney for Defendant United States Railway Association
and
James F. Dausch
Attorney for other defendants
and
Paul R. Duke
Attorney for Trustees of Penn Central Transportation Company

May 31, 1974

(Exhibit A)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

PETITION OF PENN CENTRAL COMPANY FOR TERMINATION OF RAIL OPERATIONS AND AND SEVERANCE OF RAIL PROPERTIES FROM NON-RAIL PROPERTIES

1. Penn Central Company is the parent company of the Debtor, owning 100% of the Debtor stock. Penn Central Company is also a creditor of the Debtor in the approximate amount of $43 million.

2. On October 12, 1973, Penn Central Company filed a memorandum and statement urging that continuance of the Debtor's rail operations past December 31, 1973 should be conditioned upon explicit action by the United States of America on or before November 30, 1973. No order was issued in response thereto despite the fact that no action was forthcoming from the United States.

3. Since the reorganization of the Debtor began in June, 1970, railroad operating losses have totaled more than $600 million. Taxes, rentals, interest on mortgage and debt have been deferred.

4. The Trustees have used non-operating funds to support rail operations of the Debtor.

5. Despite the deferral of the Debtor's obligations and the use of non-operating cash, the Debtor is unable to maintain working capital and railroad losses continue to

increase. In addition, the Trustees have stated before this Court that they have no hopes for any improvement in the financial position of Debtor's rail operations.

6. To compel the continuation of the rail operations of the Debtor at a loss constitutes a continuing taking of Penn Central Company property which requires the United States to pay just compensation in accordance with the Fifth Amendment of the United States Constitution.

7. The Regional Rail Reorganization Act of 1973 (the "Act") is neither adequate nor sufficient to stem the unconstitutional erosion because, *inter alia*, there is no provision for payment of taxes, interest or maintenance and no explicit provision for compensation for the taking of private property which will occur pursuant to the Act.

8. Petitioner herein will promptly file an action in the Court of Claims requiring just compensation for the taking of its property by the United States of America.

9. Under all the circumstances and recognizing the great public interest in the continuation of rail services, petitioner requests that unless the United States of America, no later than April 30, 1974, in a forthright manner acknowledges that the continued operations of the rail services of the Debtor are exclusively for the benefit of the public and will be justly compensated for in accordance with the provisions of the Fifth Amendment of the United States Constitution, this Court should order the prompt termination of all rail services thereafter.

10. It is the position of Penn Central Company that, while both the estate of the Debtor and the interest of the stockholders of Petitioner have been and continue to be seriously damaged by the continuation of the Debtor's rail service, given the unique nature of this proceeding

and given the enormous significance and importance of the rail operations of the Debtor to the public health and welfare of this country, any abrupt termination of the Debtor's rail operations would be disastrous to the public. It is for this reason that Penn Central Company requests the Court to issue a conditional Order to Terminate Rail Operations, so that the appropriate governmental agencies could, if they so desire, take that action which is required to bring about the continuation of rail operations in the northeastern United States.

11. By the same token, it is the position of Penn Central Company that since the public interest has demanded the continuation of these rail operations to date, the response to that demand has been and continues to be an interim taking within the meaning of the Fifth Amendment to the United States Constitution and thereby requires the payment of just compensation thereunder.

12. "Railroad" properties are defined in Section 1(3) of the Interstate Commerce Act, 49 U.S.C. §1(3) as:

> "all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

13. The Act, by its very terms, is applicable to and is an attempt to reorganize only the rail properties

of the Debtor as is indicated in numerous provisions of the Act. See, *e.g.* Sections 202(b), 204(a), 205(d), and 206 and 207.

14. It is now apparent that the railroad properties of the Debtor, as defined, cannot be reorganized and may be terminated, as is requested in this Petition.

15. Therefore, in order to carry out, in efficient and orderly manner, the mandates of the Act, Petitioner prays that the Court order that the non-rail properties in the estate of the Debtor be severed from and treated separately and distinctly from the Debtor's rail properties and that these non-rail properties be permitted to continue to be reorganized pursuant to these proceedings and the provisions of Section 77 of the Bankruptcy Act.

WHEREFORE, Petitioner respectfully prays:

1. That this Court set this matter down for hearing;

2. That the non-rail properties be severed from and treated separately and distinctly from the rail properties and that these non-rail properties be permitted to continue to be reorganized pursuant to these proceedings;

3. That unless the United States of America, no later than April 30, 1974, in a forthright manner, acknowledges that the continuing operations of the rail services of the Debtor are exclusively for the benefit of the public and will be justly compensated for in accordance with the provisions of the Fifth Amendment to the United States Constitution, the Court should order the Trustees to terminate all rail operations of the Debtor as soon after April 30, 1974 so as to assure orderly termination and protection of the assets of the Debtor; and in the interim period, the Court should order the Trustees to open negotiations

immediately with governmental and non-governmental bodies in order to obtain sufficient funds to permit a continuation of rail operations pending final termination thereof. Failing in the above, that the Court should order the Trustees to open negotiations with governmental and non-governmental bodies to determine that disposition of the rail properties of the Debtor which will be in the best interests of the estate of the Debtor.

4. That this Court grant such other relief as it deems just and appropriate.

/s/ Edward Rubenstone

David Berger
Gerald J. Rodos
Edward H. Rubenstone
1622 Locust Street
Philadelphia, PA 19103

Attorneys for Penn Central Company

OF COUNSEL:

DAVID BERGER, P.A.,
ATTORNEYS-AT-LAW

(Exhibit B)

* * * 12,303

creditors and stockholders in the situation, which is not like Brooks-Scanlon.

In other words, if we don't have a Brooks-Scanlon situation, then I think the rights of the stockholders and the unsecured creditors are not the same as the rights of the secured creditors.

The secured creditors in our view—and I think the Louisville Joint Stock Bank and the cases that discuss all of the protection that has to be given to the secured creditors while approving a plan of reorganization that wipes stockholders and unsecured creditors out—that the secured creditors have a special property relationship to the property that secures their debt, and they have a right to look to it for the payment of their debt.

Now, I haven't been able to find any case which says that about unsecured creditors or stockholders.

Justice Brandeis in the Radford case said flat out the rights of secured creditors with respect to their property are much different from unsecured creditors. Unfortunately, he didn't go on to elaborate about what the difference is, but I think the inference of that opinion, in the context of what goes before and after it, is that the rights of the secured creditors stand on a somewhat higher plane.

This is not the Brooks-Scanlon case, because [12,304] if we have a Brooks-Scanlon case, then nobody's interest can be eroded.

If the erosion of the estate to date or till 1975 were to erode, eat into—it obviously has to eat into the

stockholders' account, if there is anything left for them, and I don't know about that. The books of the company show they have a substantial equity, but you never can tell.

If that should erode their interest, I don't think even if it was entirely, I don't think that as long as it wasn't unreasonable erosion and that a successful reorganization was possible that that would be unconstitutional.

The Rio Grande case, the Ecker v. Pacific case, approved plans of reorganization that completely wiped out stockholders, and in the Ecker case, somebody said, in bankruptcy somebody loses.

I would point out with respect to the stockholders—

THE COURT: Can somebody make a finding in retrospect as of the date of the filing of the petition they didn't have any equity and, therefore, they didn't have anything to lose?

MR. DAUSCH: There isn't any evidence in the case which indicates the stockholders had any equity in the beginning.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption of all three cases omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, intervening-defendants in the above-entitled actions, hereby appeal to the United States Supreme Court from the judgment and order entered on June 25, 1974 by the three-judge United States District Court for the Eastern District of Pennsylvania. The appeal is taken pursuant to 28 U.S. Code, Sections 1252 and 1253.

/s/ Charles A. Horsky
Charles A. Horsky
Paul R. Duke
Counsel for Intervening-Defendants

Dated: July 1, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption *Smith* v. *United States, et al.* omitted in printing]

NOTICE OF APPEAL

An appeal having been taken July 2, 1974 by Intervening Defendants below, Notice is hereby given that Richard Joyce Smith, Trustee of the property of the New York, New Haven and Hartford Railroad Company, hereby appeals to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the Three-Judge United States District Court for the Eastern District of Pennsylvania. The appeal is taken pursuant to 28 U.S.C. §§1252, 1253.

Dated: July 3, 1974

WILBUR BOURNE RUTHRAUFF
Attorney for Richard Joyce Smith, Trustee of the property of the New York, New Haven & Hartford Railroad Company, Debtor

Of Counsel:

Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in each of three cases omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that the United States Railway Association, one of the defendants above-named, hereby appeals to the Supreme Court of the United States from the final order granting plaintiff's motion for summary judgment entered in this action on June 25, 1974.

This appeal is taken pursuant to 28 U.S.C. §1252 and 28 U.S.C. §1253.

Respectfully submitted,

/s/ Lloyd N. Cutler
LLOYD N. CUTLER

/s/ Marshall Hornblower
MARSHALL HORNBLOWER

/s/ William R. Perlik
WILLIAM R. PERLIK

Attorneys for the United States Railway Association

Of Counsel:

Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006
202-872-6000

July 17, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in each of three cases omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States District Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

Dated: July 22, 1974

CARLA A. HILLS
Assistant Attorney General

Robert E. J. Curran
United States Attorney

David J. Anderson
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the
United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in *Smith* v. *United States, et al.* omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Defendant Brinegar hereby appeals to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States District Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

DATED: July 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH,
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the Defendant
Brinegar

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in *Connecticut General* case omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Defendants Brinegar, Stafford and Shultz hereby appeal to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States District Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

DATED: July 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the Defendants
Brinegar, Stafford and Shultz.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in *Penn Central Co.* case omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Defendants Brinegar, Stafford, Shultz and the Interstate Commerce Commission hereby appeal to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States District Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

Dated: July 24, 1974

CARLA A. HILLS,
Assistant Attorney General

ROBERT E. J. CURRAN,
United States Attorney

DAVID J. ANDERSON,
Special Litigation Counsel

/s/ James F. Dausch

JAMES F. DAUSCH,
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the Defendants
Brinegar, Stafford, Shultz and
Interstate Commerce Commission

REGIONAL RAIL REORGANIZATION ACT OF 1973

Public Law 93-236
93rd Congress, H.R. 9142
January 2, 1974

87 Stat. 985

An Act

87 STAT. 985

To authorize and direct the maintenance of adequate and efficient rail services in the Midwest and Northeast region of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into titles and sections according to the following table of contents, may be cited as the "Regional Rail Reorganization Act of 1973". Regional Rail Reorganization Act of 1973.

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Sec. 603. Freight rates for recyclables.
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88-139 O

DECLARATION OF POLICY

SEC. 101. (a) FINDINGS.—The Congress finds and declares that—

(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act. 30 Stat. 544, 11 USC 1 note.

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government.

(b) PURPOSES.—It is therefore declared to be the purpose of Congress in this Act to provide for—

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

DEFINITIONS

SEC. 102. As used in this Act, unless the context otherwise requires—

(1) "Association" means the United States Railway Association, established under section 201 of this Act;

(2) "Commission" means the Interstate Commerce Commission;

(3) "Corporation" means the Consolidated Rail Corporation required to be established under section 301 of this Act;

(4) "effective date of the final system plan" means the date on which the final system plan or any revised final system plan is deemed approved by Congress, in accordance with section 208 of this Act;

(5) "employee stock ownership plan" means a technique of corporate finance that uses a stock bonus trust or a company stock money purchase pension trust which qualifies under section 401 (a) of the Internal Revenue Code of 1954 (26 U.S.C. 401(a)) in connection with the financing of corporate improvements, transfers in the ownership of corporate assets, and other capital requirements of a corporation and which is designed to build beneficial equity ownership of shares in the employer corporation into its employees substantially in proportion to their relative incomes, without requiring any cash outlay, any reduction in pay or other employee benefits, or the surrender of any other rights on the part of such employees. 68A Stat. 134; 76 Stat. 809.

(6) "final system plan" means the plan of reorganization for the restructure, rehabilitation, and modernization of railroads in reorganization prepared pursuant to section 206 and approved pursuant to section 208 of this Act;

(7) "includes" and variants thereof should be read as if the phrase "but is not limited to" were also set forth;

(8) "Office" means the Rail Services Planning Office established under section 205 of this Act;

(9) "profitable railroad" means a railroad which is not a railroad in reorganization. The term does not include the Corporation, the National Railroad Passenger Corporation, or a railroad leased, operated, or controlled by a railroad in reorganization in the region;

(10) "rail properties" means assets or rights owned, leased, or otherwise controlled by a railroad which are used or useful in rail transportation service; except that the term, when used in conjunction with the phase "railroads leased, operated, or controlled by a railroad in reorganization", shall not include assets or rights owned, leased, or otherwise controlled by a Class I railroad which is not wholly owned, operated, or leased by a railroad in reorganization but is controlled by a railroad in reorganization;

(11) "railroad" means a common carrier by railroad as defined in section 1(3) of part I of the Interstate Commerce Act (49 U.S.C. 1(3)). The term includes the Corporation and the National Railroad Passenger Corporation; 41 Stat. 474.

(12) "railroad in reorganization" means a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization pursuant to this Act as prescribed in section 207(b) of this Act. A "bankruptcy proceeding" includes a proceeding pursuant to section 77 of the Bankruptcy Act (11 U.S.C. 205) and an equity receivership or equivalent proceeding; 49 Stat. 911; 76 Stat. 572.

(13) "Region" means the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order);

(14) "Secretary" means the Secretary of Transportation or his delegate, unless the context indicates otherwise; and

(15) "State" means any State or the District of Columbia.

TITLE II—UNITED STATES RAILWAY ASSOCIATION

FORMATION AND STRUCTURE

SEC. 201. (a) ESTABLISHMENT.—There is established, in accordance with the provisions of this section, an incorporated nonprofit association to be known as the United States Railway Association.

(b) ADMINISTRATION.—The Association shall be directed by a Board of Directors. The individuals designated, pursuant to subsection (d) (2) of this section, as the Government members of such Board shall be deemed the incorporators of the Association and shall take whatever steps are necessary to establish the Association, including filing of articles of incorporation, and serving as an acting Board of Directors for a period of not more than 45 days after the date of incorporation of the Association.

(c) STATUS.—The Association shall be a government corporation of the District of Columbia subject, to the extent not inconsistent with this title, to the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29–1001 et seq.). Except as otherwise provided, employees of the Association shall not be deemed employees of the Federal Government. The Association shall have succession until dissolved by Act of Congress, shall maintain its principal office in the District of Columbia, and shall be deemed to be a resident of the District of Columbia with respect to venue in any legal proceeding.

76 Stat. 265.

(d) BOARD OF DIRECTORS.—The Board of Directors of the Association shall consist of 11 individuals, as follows:

(1) the Chairman, a qualified individual who shall be appointed by the President, by and with the advice and consent of the Senate;

(2) three Government members, who shall be the Secretary, the Chairman of the Commission, and the Secretary of the Treasury, or their duly authorized representatives; and

(3) seven nongovernment members, who shall be appointed by the President, by and with the advice and consent of the Senate, on the following basis—

(A) one to be selected from a list of qualified individuals recommended by the Association of American Railroads or its successor who are representatives of profitable railroads;

(B) one to be selected from a list of qualified individuals recommended by the American Federation of Labor and Congress of Industrial Organizations or its successor who are representative of railroad labor;

(C) one to be selected from a list of qualified individuals recommended by the National Governors Conference;

(D) one to be selected from a list of qualified individuals recommended by the National League of Cities and Conference of Mayors;

(E) two to be selected from lists of qualified individuals recommended by shippers and organizations representative of significant shipping interests including small shippers;

(F) one to be selected from lists of qualified individuals recommended by financial institutions, the financial community, and recognized financial leaders.

As used in this paragraph, a list of qualified individuals shall consist of not less than three individuals.

Except for the members appointed under paragraphs (1) and (3) (A), (B), (E), and (F), no member of the Board may have any employment or other direct financial relationship with any railroad.

Compensation.

A member of the Board who is not otherwise an employee of the Federal Government may receive $300 per diem when engaged in the actual performance of his duties plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

(e) TERMS OF OFFICE.—The terms of office of the nongovernment members of the Board of Directors of the Association first taking office shall expire as designated by the President at the time of nomination—two at the end of the second year; two at the end of the fourth year; and three at the end of the sixth year. The term of office of the Chairman of such Board shall be 6 years. Successors to members of such Board shall be appointed in the same manner as the original members and, except in the case of government members, shall have terms of office expiring 6 years from the date of expiration of the terms for which their predecessors were appointed. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(f) QUORUM.—Beginning 45 days after the date of incorporation of the Association, six members of the Board, including three of the nongovernment members, shall constitute a quorum for the transaction of any function of the Association.

(g) PRESIDENT.—The Board of Directors of the Association, upon the recommendation of the Secretary, shall appoint a qualified individual to serve as the President of the Association at the pleasure of the Board. The President of the Association, subject to the direction of the Board, shall manage and supervise the affairs of the Association.

(h) EXECUTIVE COMMITTEE.—The Board of Directors of the Association shall have an executive committee which shall consist of the Chairman of the Board, the Secretary, the Chairman of the Commission, and two other members who shall be selected by the members of the Board.

(i) MISCELLANEOUS.—(1) The Association shall have a seal which shall be judicially recognized.

(2) The Administrator of General Services shall furnish the Association with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(3) The Secretary is authorized to transfer to the Association or the Corporation rights in intellectual property which are directly related to the conduct of the functions of the Association or the Corporation, to the extent that the Federal Government has such rights and to the extent that transfer is necessary to carry out the purposes of this Act.

(j) USE OF NAMES.—No person, except the Association, shall hereafter use the words "United States Railway Association" as a name for any business purpose. No person, except the corporation directed to be established under section 301 of this Act, shall hereafter use the words "Consolidated Rail Corporation" as a name for any business purpose. Violations of these provisions may be enjoined by any court of general jurisdiction in an action commenced by the Association or the Corporation. In any such action, the Association or the Corporation may recover any actual damages flowing from such violation, and, in addition, shall be entitled to punitive damages (regardless of the existence or nonexistence of actual damage) in an amount not to exceed $100 for each day during which such violation was committed. The district courts of the United States shall have jurisdiction over actions brought under this subsection, without regard to the amount in controversy or the citizenship of the parties.

Penalty.

GENERAL POWERS AND DUTIES OF THE ASSOCIATION

SEC. 202. (a) GENERAL.—To carry out the purposes of this Act, the Association is authorized to—

(1) engage in the preparation and implementation of the final system plan;

Post, p. 1000. (2) issue obligations under section 210 of this title and make loans under section 211 of this title;

(3) provide assistance to States and local or regional transportation authorities in accordance with section 403 of this Act;

(4) sue and be sued, complain and defend, in the name of the Association and through its own attorneys; adopt, amend, and repeal bylaws governing the operation of the Association and such rules and regulations as are necessary to carry out the authority granted under this Act; conduct its affairs, carry on operations, and maintain offices;

(5) appoint, fix the compensation, and assign the duties of such attorneys, agents, consultants, and other full- and part-time employees as it deems necessary or appropriate; except that (1) no officer of the Association, including the Chairman, may receive compensation at a rate in excess of that prescribed for level I of the Executive Schedule under section 5312 of title 5, United States Code; and (2) no individual may hold a position in violation of regulations which the Secretary shall establish to avoid conflicts of interest and to protect the interests of the public;

80 Stat. 460; 84 Stat. 776.

(6) acquire and hold such real and personal property as it deems necessary or appropriate in the exercise of its responsibilities under this Act, and to dispose of any such property held by it;

(7) consult with the Secretary of the Army and the Chief of Engineers and request the assistance of the Corps of Engineers, and the Secretary of the Army may direct the Corps of Engineers to cooperate fully with the Association, the Corporation, or any entity designated in accordance with section 206(c)(1)(C) in order to carry out the purposes of this Act;

(8) consult on an ongoing basis with the Chairman of the Federal Trade Commission and the Attorney General to assess the possible anticompetitive effects of various proposals and to negotiate provisions which would, to the greatest extent practicable in accordance with the purposes of this Act and the goal set forth in section 206(a)(5) of this title, alleviate any such anticompetitive effects;

(9) consult with representatives of science, industry, agriculture, labor, environmental protection and consumer organizations, and other groups, as it deems advisable; and

(10) enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its functions and duties with any person (including a government entity).

(b) DUTIES.—In addition to its duties and responsibilities under other provisions of this Act, the Association shall—

(1) prepare a survey of existing rail services in the region, including patterns of traffic movement; traffic density over identified lines; pertinent costs and revenues of lines; and plant, equipment, and facilities (includng yards and terminals);

Study.

(2) prepare an economic and operational study and analysis of present and future rail service needs in the region; the nature and volume of the traffic in the region now being moved by rail or likely to be moved by rail in the future; the extent to which available alternative modes of transportation could move such traffic as is now carried by railroads in reorganization; the relative economic, social, and environmental costs that would be involved in the use of such available alternative modes, including energy resource costs; and the competitive or other effects on profitable railroads;

(3) prepare a study of rail passenger services in the region, in terms of scope and quality;

(4) consider the views of the Office and of all government officials and persons who submit views, reports, or testimony under section 205(d)(1) of this title or in the course of proceedings conducted by the Office;

Post, p. 994.

(5) consider methods of achieving economies in the cost of rail system operation in the region including consolidation, pooling, and joint use or operation of lines, facilities, and operating equipment; relocation; rehabilitation and modernization of equipment, track, and other facilities; and abandonment of lines consistent with meeting needs and service requirements; together with the anticipated economic, social, and environmental costs and benefits of each such method;

(6) consider the effect on railroad employees of any restructuring of rail services in the region;

(7) make available to the Secretary, the Director of the Office and appropriate committees of the Congress all studies, data, and other information acquired or developed by the Association.

(c) INVESTMENT OF FUNDS.—Uncommitted funds of the Association shall be kept in cash on hand or on deposit, or invested in obligations of the United States or guaranteed thereby, or in obligations, participations, or other investments which are lawful investments for fiduciary, trust, or public funds.

(d) EXEMPTION FROM TAXATION.—The Association, including its franchise, capital reserves, surplus, security holdings, and income shall be exempt from all taxation now or hereafter imposed by the United States, any commonwealth, territory, dependency, or possession thereof, or by any State or political subdivision thereof, except that any real property of the Association shall be subject to taxation to the same extent according to its value as other real property is taxed.

(e) ANNUAL REPORT.—The Association shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed report on all activities of the Association during the preceding fiscal year. Each such report shall include (1) the Association's statement of specific and detailed objectives for the activities and programs conducted and assisted under this Act; (2) statements of the Association's conclusions as to the effectiveness of such activities and programs in meeting the stated objectives and the purposes of this Act, measured through the end of the preceding fiscal year; (3) recommendations with respect to any legislation or administrative action which the Association deems necessary or desirable; (4) a statistical compilation of the obligations issued and loans made under this Act; (5) a summary of outstanding problems confronting the Association, in order of priority; (6) all other information required to be submitted to the Congress pursuant to any other provision of this Act; and (7) the Association's projections and plans for its activities and programs during the next fiscal year.

Report to Congress and President.

(f) BUDGET.—The receipts and disbursements of the Association (other than administrative expenses referred to in subsection (g) of

87 STAT. 992

this section) in the discharge of its functions shall not be included in the totals of the budget of the United States Government, and shall be exempt from any annual expenditure and net lending (budget outlays) limitations imposed on a budget of the United States Government. The Chairman of the Association shall transmit annually to the Congress a budget for program activities and for administrative expenses of the Association. The Chairman shall report annually to the Congress the amount of net lending of the Association, which would be included in the totals of the budgets of the United States Government, if the Association's activities were not excluded from those totals as a result of this section.

Budget transmittal to Congress.

(g) ACCOUNTABILITY.—(1) Section 201 of the Government Corporation Control Act (31 U.S.C. 856) is amended by striking out "and" at the end of clause (6) and by inserting immediately before the period at the end thereof the following: ", (8) the United States Railway Association".

70 Stat. 667; 85 Stat. 37.

(2) The Chairman of the Association shall transmit annually to the Office of Management and Budget a budget for administrative expenses of the Association. Whenever the Association submits any budget estimate or request to the Office of Management and Budget, it shall concurrently transmit a copy of the estimate or request to the Congress. Within budgetary constraints of the Congress, the maximum feasible and prudent budgetary flexibility shall be provided to the Association to permit effective operations.

Budget transmittal to Office of Management and Budget and Congress.

ACCESS TO INFORMATION

SEC. 203. (a) PLANNING.—Each railroad operating in the region shall provide such relevant information as may be requested by the Secretary, the Office, or the Association in connection with the performance of their respective functions under any provision of this Act. No information may be requested under this subsection after the effective date of the final system plan.

Recordkeeping.

(b) OTHER.—Each railroad or other person or government entity seeking financial assistance from the Association shall maintain and make available such records, make and submit such reports, and provide such data, materials, or other relevant information as may be requested by the Association.

(c) ENFORCEMENT.—Where authorized under subsection (a) or (b) of this section and upon presenting appropriate credentials and a written notice of inspection authority, any officer or employee duly designated by the Secretary, the Office, or the Association may, at reasonable times, inspect records, papers, processes, rolling stock, systems, equipment, or facilities and may, in furtherance of their respective functions under this Act, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or other order the attendance and testimony of such witnesses and the production of such information as is deemed advisable. Subpoenas shall be issued under the signature of the Secretary, the Director of the Office, or the Chairman or President of the Association and may be served by any duly designated individual. In case of contumacy or refusal to obey such a subpoena or order by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such district court shall, upon petition, have jurisdiction to issue to such person an order requiring him to comply forthwith. Failure to obey such an order is punishable by such court as a contempt of court.

(d) CONGRESS.—Nothing in this section shall authorize the withholding of information from any duly authorized committee of the Congress.

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REPORT

SEC. 204. (a) PREPARATION.—Within 30 days after the date of enactment of this Act, the Secretary shall prepare a comprehensive report containing his conclusions and recommendations with respect to the geographic zones within the region in and between which rail service should be provided and the criteria upon which such conclusions and recommendations are based. The Secretary may use as a basis for the identification of such geographic zones the standard metropolitan statistical areas, groups of such areas, counties, or groups of counties having similar economic characteristics such as mining, manufacturing, or farming.

(b) SUBMISSION.—The Secretary shall submit the report required by subsection (a) of this section to the Office, the Association, the Governor and public utilities commission of each State studied in the report, local governments, consumer organizations, environmental groups, the public, and the Congress. The Secretary shall further cause a copy of the report to be published in the Federal Register.

Publication in Federal Register.

RAIL SERVICES PLANNING OFFICE

SEC. 205. (a) ESTABLISHMENT.—There is established, on the date of enactment of this Act, a new Office in the Commission to be known as the Rail Services Planning Office. The Office shall function continuously pursuant to the provisions of this Act, and shall cease to exist 5 years after the date of enactment of this Act. The Office shall be administered by a director.

(b) DIRECTOR.—The Director of the Office shall be appointed by the Chairman of the Commission with the concurrence of 3 members of the Commission. The Director of the Office shall administer and be responsible for the discharge of the functions and duties of the Office from the date he takes office unless removed for cause by the Commission. He shall be compensated at a rate to be set by the Chairman of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, classification, and General Schedule pay rates, but at a rate not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title.

5 USC 5332 note.

(c) POWERS.—The Director of the Office is subject to the direction of, and shall report to, such member of the Commission as the Chairman thereof shall designate. The Chairman may designate himself as that member. Such Director is authorized, with the concurrence of such member or (in case of disagreement) the Chairman of the Commission, to—

(1) appoint, fix the compensation, and assign the duties of employees of the Office without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and to procure temporary and intermittent services to the same extent as is authorized under section 3109 of title 5, United States Code, but at rates not to exceed $250 a day for qualified experts. Each department, agency, and instrumentality of the executive branch of the Federal Government and each independent regulatory agency of the United States is authorized and shall give careful consideration to a request to furnish to the Director of the Office, upon written request, on a reimbursable basis or otherwise, such assistance as the Director deems necessary to carry out the functions and duties of the Office. Such assistance includes transfer of personnel with their consent and without prejudice to their position and rating; and

80 Stat. 416.

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Contract authority.

(2) enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the functions and duties of the Office, with any person (including a government entity).

(d) DUTIES.—In addition to its duties, and responsibilities under other provisions of this Act, the Office shall—

(1) study and evaluate the Secretary's report on rail services in the region required under section 204(a) of this Act and submit its report thereon to the Association within 120 days after the date of enactment of this Act. The Office shall also solicit, study, and evaluate the views with respect to present and future rail service needs of the region from Governors of States within the region; mayors and chief executives of political subdivisions within such States; shippers; the Secretary of Defense; manufacturers, wholesalers, and retailers within the region; consumers of goods and products shipped by rail; and all other interested persons. The Office shall conduct public hearings to solicit comments on such report and to receive such views;

Public hearings.

(2) employ and utilize the services of attorneys and such other personnel as may be required in order properly to protect the interests of those communities and users of rail service which, for whatever reason, such as their size or location, might not otherwise be adequately represented in the course of the hearings and evaluations which the Office is required to conduct and perform under other provisions of this Act;

(3) within 180 days after the date of enactment of this Act, determine and publish standards for determining the "revenue attributable to the rail properties", the "avoidable costs of providing service", and "a reasonable return on the value", as those phrases are used in section 304 of this Act, after a proceeding in accordance with the provisions of section 553 of title 5, United States Code; and

80 Stat. 383.

(4) assist States and local and regional transportation agencies in making determinations whether to provide rail service continuation subsidies to maintain in operation particular rail properties by establishing criteria for determining whether particular rail properties are suitable for rail service continuation subsidies. Such criteria should include the following considerations: Rail properties are suitable if the cost of the required subsidy for such properties per year to the taxpayers is less than the cost of termination of rail service over such properties measured by increased fuel consumption and operational costs for alternative modes of transportation; the cost to the gross national product in terms of reduced output of goods and services; the cost of relocating or assisting through unemployment, retraining, and welfare benefits to individuals and firms adversely affected thereby; and the cost to the environment measured by damage caused by increased pollution.

FINAL SYSTEM PLAN

SEC. 206. (a) GOALS.—The final system plan shall be formulated in such a way as to effectuate the following goals:

(1) the creation, through a process of reorganization, of a financially self-sustaining rail service system in the region;

(2) the establishment and maintenance of a rail service system adequate to meet the rail transportation needs and service requirements of the region;

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(3) the establishment of improved high-speed rail passenger service, consonant with the recommendations of the Secretary in his report of September 1971, entitled "Recommendations for Northeast Corridor Transportation";

(4) the preservation, to the extent consistent with other goals, of existing patterns of service by railroads (including short-line and terminal railroads), and of existing railroad trackage in areas in which fossil fuel natural resources are located, and the utilization of those modes of transportation in the region which require the smallest amount of scarce energy resources and which can most efficiently transport energy resources;

(5) the retention and promotion of competition in the provision of rail and other transportation services in the region;

(6) the attainment and maintenance of any environmental standards, particularly the applicable national ambient air quality standards and plans established under the Clean Air Act Amendments of 1970, taking into consideration the environmental impact of alternative choices of action;

84 Stat. 1676. 42 USC 1857b note.

(7) the movement of passengers and freight in rail transportation in the region in the most efficient manner consistent with safe operation, including the requirements of commuter and intercity rail passenger service; the extent to which there should be coordination with the National Railroad Passenger Corporation and similar entities; and the identification of all short-to-medium distance corridors in densely populated areas in which the major upgrading of rail lines for high-speed passenger operation would return substantial public benefits; and

(8) the minimization of job losses and associated increases in unemployment and community benefit costs in areas in the region presently served by rail service.

(b) FACTORS.—The final system plan shall be based upon due consideration of all factors relevant to the realization of the goals set forth in subsection (a) of this section. Such factors include the need for and the cost of rehabilitation and modernization of track, equipment, and other facilities; methods of achieving economies in the cost of rail operations in the region; means of achieving rationalization of rail services and the rail service system in the region; marketing studies; the impact on railroad employees; consumer needs; traffic analyses; financial studies; and any other factors identified by the Association under section 202(b) of this title or in the report of the Secretary required under section 204(a) of this title.

Ante, p. 990.

(c) DESIGNATIONS.—The final system plan shall designate—

(1) which rail properties of railroads in reorganization in the region or of railroads leased, operated, or controlled by any railroad in reorganization in the region—

(A) shall be transferred to the Corporation;

(B) shall be offered for sale to a profitable railroad operating in the region and, if such offer is accepted, operated by such railroad; the plan shall designate what additions shall be made to the designation under subparagraph (A) of this paragraph in the event such profitable railroad fails to accept such offer;

(C) shall be purchased, leased, or otherwise acquired from the Corporation by the National Railroad Passenger Corporation in accordance with the exercise of its option under section 601(d) of this Act for improvement to achieve the goal set forth in subsection (a)(3) of this section;

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(D) may be purchased or leased from the Corporation by a State or a local or regional transportation authority to meet the needs of commuter and intercity rail passenger service; and

(E) if not otherwise required to be operated by the Corporation, a government entity, or a responsible person, are suitable for use for other public purposes, including highways, other forms of transportation, conservation, energy transmission, education or health care facilities, or recreation. In carrying out this subparagraph, the Association shall solicit the views and recommendations of the Secretary, the Secretary of the Interior, the Administrator of the Environmental Protection Agency, and other agencies of the Federal Government and of the States and political subdivisions thereof within the region, and the general public; and

(2) which rail properties of profitable railroads operating in the region may be offered for sale to the Corporation or to other profitable railroads operating in the region subject to paragraphs (3) and (4) of subsection (d) of this section.

(d) TRANSFERS.—All transfers or conveyances pursuant to the final system plan shall be made in accordance with, and subject to, the following principles:

(1) All rail properties to be transferred to the Corporation by a profitable railroad, by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be transferred in exchange for stock and other securities of the Corporation (including obligations of the Association) and the other benefits accruing to such railroad by reason of such transfer.

(2) All rail properties to be conveyed to a profitable railroad operating in the region by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be conveyed in exchange for compensation from the profitable railroad.

(3) Notwithstanding any other provision of this Act, no acquisition under this Act shall be made by any profitable railroad operating in the region without a determination with respect to each such transaction and all such transactions cumulatively (A) by the Association, upon adoption and release of the preliminary system plan, that such acquisition or acquisitions will not materially impair the profitability of any other profitable railroad operating in the region or of the Corporation, and (B) by the Commission, which shall be made within 90 days after adoption and release by the Association of the preliminary system plan, that such acquisition or acquisitions will be in full accord and comply with the provisions and standards of section 5 of part I of the Interstate Commerce Act (49 U.S.C. 5). The determination by the Association shall not be reviewable in any court. The determination by the Commission shall not be reviewable in any court.

62 Stat. 472.

(4) Where the final system plan designates specified rail properties of a railroad in reorganization in the region, or of a railroad leased, operated, or controlled by a railroad in reorganization in the region, to be offered for sale to and operated by a profitable railroad operating in the region, such designation shall terminate 30 days after the effective date of the final system plan unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such offer. Where the final system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation or to other profitable railroads operating in the region, such designation and authorization shall terminate 60 days after the effective date of the final system plan unless, prior to such date, a binding agreement with respect to such properties has been entered into and concluded.

87 STAT. 997

(5) All properties sold by the Corporation pursuant to sections 206(e)(1)(C) and 601(d) of this Act shall be transferred at a value related to the value received for the transfer to the Corporation of such properties.

(e) CORPORATION FEATURES.—The final system plan shall set forth—

(1) pro forma earnings for the Corporation, as reasonably projected and considering the additions or changes in the designation of rail properties to be operated by the Corporation which may be made under subsection (d)(4) of this section;

(2) the capital structure of the Corporation, based on the pro forma earnings of the Corporation as set forth, including such debt capitalization as shall be reasonably deemed to conform to the requirements of the public interest with respect to railroad debt securities, including the adequacy of coverage of fixed charges; and

(3) the manner in which employee stock ownership plans may, to the extent practicable, be utilized for meeting the capitalization requirements of the Corporation, taking into account (A) the relative cost savings compared to conventional methods of corporate finance; (B) the labor cost savings; (C) the potential for minimizing strikes and producing more harmonious relations between labor organizations and railway management; (D) the projected employee dividend incomes; (E) the impact on quality of service and prices to railway users; and (F) the promotion of the objectives of this Act of creating a financially self-sustaining railway system in the region which also meets the service needs of the region and the Nation.

(f) VALUE.—The final system plan shall designate the value of all rail properties to be transferred under the final system plan and the value of the securities and other benefits to be received for transferring those rail properties to the Corporation in accordance with the final system plan.

(g) OTHER PROVISIONS.—The final system plan may recommend arrangements among various railroads for joint use or operation of rail properties on a shared ownership, cooperative, pooled, or condominium-type basis, subject to such terms and conditions as may be specified in the final system plan. The final system plan shall also make such designations as are determined to be necessary in accordance with the provisions of section 402 or 403 of this Act.

(h) OBLIGATIONAL AUTHORITY.—The final system plan shall recommend the amount of obligations of the Association which are necessary to enable it to implement the final system plan.

(i) TERMS AND CONDITIONS FOR SECURITIES.—The final system plan may include terms and conditions for any securities to be issued by the Corporation in exchange for the conveyance of rail properties under the final system plan which in the judgement of the Association will minimize any actual or potential debt burden on the Corporation. Any such terms and conditions for securities of the Corporation which purport to directly obligate the Association shall not become effective without affirmative approval, with or without modification by a joint resolution of the Congress.

ADOPTION OF FINAL SYSTEM PLAN

SEC. 207. (a) PRELIMINARY SYSTEM PLAN.—(1) Within 300 days after the date of enactment of this Act, the Association shall adopt and release a preliminary system plan prepared by it on the basis of reports and other information submitted to it by the Secretary, the Office, and interested persons in accordance with this Act and on the basis of its own investigations, consultations, research, evaluation, and analysis pursuant to this Act. Copies of the preliminary system plan shall be transmitted by the Association to the Secretary, the Office, the Governor and public utility commission of each State in the region, the Congress, each court having jurisdiction over a railroad in reorganization in the region, the special court, and interested persons, and a copy shall be published in the Federal Register. The Association shall invite and afford interested persons an opportunity to submit comments on the preliminary system plan to the Association within 60 days after the date of its release.

Copies, transmittal to Congress.

Publication in Federal Register.

(2) The Office is authorized and directed to hold public hearings on the preliminary system plan and to make available to the Association a summary and analysis of the evidence received in the course of such proceedings, together with its critique and evaluation of the preliminary system plan, not later than 60 days after the date of release of such plan.

Public hearings.

(b) APPROVAL.—Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court.

49 Stat. 911; 76 Stat. 572.

(c) ADOPTION.—Within 420 days after the date of enactment of this Act, the executive committee of the Association shall prepare and submit a final system plan for the approval of the Board of Directors of the Association. A copy of such submission shall be simultaneously

presented to the Commission. The submission shall reflect evaluation of all responses and summaries of responses received, testimony at any public hearings, and the results of additional study and review. Within 30 days thereafter, the Board of Directors of the Association shall by a majority vote of all its members approve a final system plan which meets all of the requirements of section 206 of this title.

Ante, p. 994.

(d) REVIEW OF COMMISSION.—Within 30 days following the adoption of the final system plan by the Association under subsection (c) of this section and the submission of such plan to Congress under section 208(a) of this title, the Commission shall submit to the Congress an evaluation of the final system plan delivered to both Houses of Congress.

Plan evaluation, submittal to Congress.

REVIEW BY CONGRESS

SEC. 208. (a) GENERAL.—The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such period stating that it does not favor the final system plan.

(b) REVISED PLAN.—If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, the Association, with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section.

(c) COMPUTATION.—For purposes of this section—

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

JUDICIAL REVIEW

SEC. 209. (a) GENERAL.—Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties.

(b) SPECIAL COURT.—Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected

82 Stat. 109.

may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 77 of the Bankruptcy Act (11 U.S.C. 205). The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The panel may issue rules for the conduct of its functions under this subsection. No determination by the panel under this subsection may be reviewed in any court.

49 Stat. 911; 76 Stat. 572.

(c) DELIVERY OF PLAN TO SPECIAL COURT.—Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region and of any railroad leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region or railroads leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

(d) BANKRUPTCY COURTS.—Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to each district court of the United States or any other court having jurisdiction over a railroad in reorganization in the region and shall certify to each such court—

(1) which rail properties of that railroad in reorganization are to be transferred to the Corporation under the final system plan; and

(2) which rail properties of that railroad in reorganization, if any, are to be conveyed to profitable railroads operating in the region, under the final system plan.

OBLIGATIONS OF THE ASSOCIATION

SEC. 210. (a) GENERAL.—To carry out the purposes of this Act, the Association is authorized to issue bonds, debentures, trust certificates, securities, or other obligations (herein cited as "obligations") in accordance with this section. Such obligations shall have such maturities and bear such rate or rates of interest as are determined by the Association with the approval of the Secretary of the Treasury. Such obligations shall be redeemable at the option of the Association prior to maturity in the manner stipulated in each such obligation, and may be purchased by the Association in the open market at a price which is reasonable.

(b) MAXIMUM OBLIGATIONAL AUTHORITY.—Except as otherwise provided in the last sentence of this subsection, the aggregate amount of obligations of the Association issued under this section which may be outstanding at any one time shall not exceed $1,500,000,000 of which the aggregate amount issued to the Corporation shall not exceed

$1,000,000,000. Of the aggregate amount of obligations issued to the Corporation by the Association, not less than $500,000,000 shall be available solely for the rehabilitation and modernization of rail properties acquired by the Corporation under this Act and not disposed of by the Corporation pursuant to section 206(c)(1)(C) of this Act. Any modification to the limitations set forth in this subsection shall be made by joint resolution adopted by the Congress.

(c) GUARANTEES.—The Secretary shall guarantee the payment of principal and interest on all obligations issued by the Association in accordance with this Act and which the Association requests be guaranteed.

(d) VALIDITY.—No obligation issued by the Association under this section shall be terminated, canceled, or otherwise revoked, except in accordance with lawful terms and conditions prescribed by the Association. Such an obligation shall be conclusive evidence that it is in compliance with this section, has been approved, and is legal as to principal, interest, and other terms. An obligation of the Association shall be valid and incontestable in the hands of a holder, except as to fraud, duress, mutual mistake of fact, or material misrepresentation by or involving such holder.

(e) THE SECRETARY OF THE TREASURY.—If at any time the moneys available to the Secretary are insufficient to enable him to discharge his responsibilities under subsection (c) of this section, he shall issue notes or other obligations to the Secretary of the Treasury in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury. Such obligations shall bear interest at a rate to be determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of such obligations. The Secretary of the Treasury is authorized and directed to purchase any such obligations and for such purpose is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended. The purposes for which securities may be issued under such Act are extended to include any purchase of notes or other obligations issued under this subsection. At any time, the Secretary of the Treasury may sell any such obligations, and all sales, purchases, and redemptions of such obligations by the Secretary of the Treasury shall be treated as public debt transactions of the United States.

40 Stat. 288. 31 USC 774.

(f) AUTHORIZATION FOR APPROPRIATIONS.—There are hereby authorized to be appropriated to the Secretary such amounts as are necessary to discharge the obligations of the United States arising under this section.

(g) LAWFUL INVESTMENTS.—All obligations issued by the Association shall be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority and control of the United States or any officer or officers thereof. All such obligations issued pursuant to this section shall be exempt securities within the meaning of laws administered by the Securities and Exchange Commission.

LOANS

SEC. 211. (a) GENERAL.—The Association is authorized, in accordance with the provisions of this section and such rules and regulations as it shall prescribe, to make loans to the Corporation, the National Railroad Passenger Corporation, and other railroads (including a

railroad in reorganization which has been found to be reorganizable under section 77 of the Bankruptcy Act pursuant to section 207(b) of this title) in the region, for purposes of assisting in the implementation of the final system plan; to a State or local or regional transportation authority pursuant to section 403 of this Act; and to provide assistance in the form of loans to any railroad which (A) connects with a railroad in reorganization, and (B) is in need of financial assistance to avoid reorganization proceedings under section 77 of the Bankruptcy Act (11 U.S.C. 205). No such loan shall be made by the Association to a railroad unless such loans shall, where applicable, be treated as an expense of administration. The rights referred to in the last sentence of section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)) shall in no way be affected by this Act.

49 Stat. 911; 76 Stat. 572. 11 USC 205.

(b) APPLICATIONS.—Each application for such a loan shall be made in writing to the Association in such form and with such content and other submissions as the Association shall prescribe to protect reasonably the interests of the United States. The Association shall publish a notice of the receipt of each such application in the Federal Register and shall afford interested persons an opportunity to comment thereon.

Publication in Federal Register.

(c) TERMS AND CONDITIONS.—Each loan shall be extended in such form, under such terms and conditions, and pursuant to such regulations as the Association deems appropriate. Such loan shall bear interest at a rate not less than the greater of a rate determined by the Secretary of the Treasury taking into consideration (1) the rate prevailing in the private market for similar loans as determined by the Secretary of the Treasury, or (2) the current average yield on outstanding marketable obligations of the Association with remaining periods of maturity comparable to the average maturities of such loans, plus such additional charge, if any, toward covering costs of the Association as the Association may determine to be consistent with the purposes of this Act.

(d) MODIFICATIONS.—The Association is authorized to approve any modification of any provision of a loan under this section, including the rate of interest, time of payment of interest or principal, security, or any other term or condition, upon agreement of the recipient of the loan and upon a finding by the Association that such modification is equitable and necessary or appropriate to achieve the policy declared in subsection (f) of this section.

(e) PREREQUISITES.—The Association shall make a finding in writing, before making a loan to any applicant under this section, that—

(1) the loan is necessary to carry out the final system plan or to prevent insolvency;

(2) it is satisfied that the business affairs of the applicant will be conducted in a reasonable and prudent manner; and

(3) the applicant has offered such security as the Association deems necessary to protect reasonably the interests of the United States.

(f) POLICY.—It is the intent of Congress that loans made under this section shall be made on terms and conditions which furnish reasonable assurance that the Corporation or the railroads to which such loans are granted will be able to repay them within the time fixed and that the goals of the final system plan are reasonably likely to be achieved.

RECORDS, AUDIT, AND EXAMINATION

SEC. 212. (a) RECORDS.—Each recipient of financial assistance under this title, whether in the form of loans, obligations, or other arrangements, shall keep such records as the Association or the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance and such other records as will facilitate an effective audit.

(b) AUDIT AND EXAMINATION.—The Association, the Secretary, and the Comptroller General of the United States, or any of their duly authorized representatives shall, until the expiration of 3 years after the implementation of the final system plan, have access for the purpose of audit and examination to any books, documents, papers, and records of such recipients which in the opinion of the Association, the Secretary, or the Comptroller General may be related or pertinent to the loans, obligations or other arrangements referred to in subsection (a) of this section. The Association or any of its duly authorized representatives shall, until any financial assistance received under this title has been repaid to the Association, have access to any such materials which concern any matter that may bear upon—

(1) the ability of the recipient of such financial assistance to make repayment within the time fixed therefor;

(2) the effectiveness with which the proceeds of such assistance is used; and

(3) the implementation of the final system plan and the realization of the declaration of policy of this Act.

EMERGENCY ASSISTANCE PENDING IMPLEMENTATION

SEC. 213. (a) EMERGENCY ASSISTANCE.—The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act.

(b) AUTHORIZATION FOR APPROPRIATIONS.—There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $85,000,000, to remain available until expended.

AUTHORIZATION FOR APPROPRIATIONS

SEC. 214. (a) SECRETARY.—There are authorized to be appropriated to the Secretary for purposes of preparing the reports and exercising other functions to be performed by him under this Act such sums as are necessary, not to exceed $12,500,000, to remain available until expended.

(b) OFFICE.—There are authorized to be appropriated to the Commission for the use of the Office in carrying out its functions under this Act such sums as are necessary, not to exceed $5,000,000, to remain available until expended. The budget for the Office shall be submitted by the Commission directly to the Congress and shall not be subject to review of any kind by any other agency or official of the United States. Moneys appropriated for the Office shall not be withheld by any agency or official of the United States or used by the Commission for any purpose other than the use of the Office. No part of any other moneys appropriated to the Commission shall be withheld by any other agency or official of the United States to offset any moneys appropriated pursuant to this subsection.

Budget submittal to Congress.

(c) ASSOCIATION.—There are authorized to be appropriated to the Association for purposes of carrying out its administrative expenses under this Act such sums as are necessary, not to exceed $26,000,000, to remain available until expended.

MAINTENANCE AND IMPROVEMENT OF PLANT

SEC. 215. Prior to the date upon which rail properties are conveyed to the Corporation under this Act, the Secretary, with the approval of the Association, is authorized to enter into agreements with railroads in reorganization in the region (or railroads leased, operated, or controlled by railroads in reorganization) for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan. Agreements entered into pursuant to this section shall specifically identify the type and quality of improvements to be made pursuant to such agreements. Notwithstanding section 210(b) of this title, the Association shall issue obligations under section 210(a) of this title in an amount sufficient to finance such agreements and shall require the Corporation to assume any such obligations. However, the Association may not issue obligations under this section in an aggregate amount in excess of $150,000,000. The Secretary may not enter into any agreements under this section until he issues regulations setting forth procedures and guidelines for the administration of this section. The Corporation shall not be required under title III of this Act to compensate any railroad in reorganization for that portion of the value of rail properties transferred to it under this Act which is attributable to the acquisition, maintenance, or improvement of such properties under this section.

Ante, p. 1000.

TITLE III—CONSOLIDATED RAIL CORPORATION

FORMATION AND STRUCTURE

SEC. 301. (a) ESTABLISHMENT.—There shall be established within 300 days after the date of enactment of this Act, in accordance with the provisions of this section, a corporation to be known as the Consolidated Rail Corporation.

(b) STATUS.—The Corporation shall be a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government. The Corporation shall be deemed a common carrier by railroad under section 1(3) of the Interstate Commerce Act (49 U.S.C. 1(3)), shall be subject to the provisions of this Act and, to the extent not inconsistent with such Acts, shall be subject to applicable State law. The principal office of the Corporation shall be located in Philadelphia in the Commonwealth of Pennsylvania.

41 Stat. 424.

(c) INCORPORATORS.—The members of the executive committee of the Association shall be the incorporators of the Corporation and shall take whatever steps are necessary to establish the Corporation, including the filing of articles of incorporation. The incorporators shall also serve as the Board of Directors of the Corporation until the stock and other securities of the Corporation are distributed to the estates of the railroads in accordance with section 303(c) of this title and shall adopt the intial bylaws of the Corporation.

(d) BOARD OF DIRECTORS.—The Board of Directors of the Corporation shall consist of 15 individuals selected in accordance with the articles and bylaws of the Corporation: *Provided*, That so long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, three of the members of such board shall be the Secretary, the Chairman and the President of the Association and five of the members of such board shall be individuals appointed as such by the President, by and with the advice and consent of the Senate.

(e) INITIAL CAPITALIZATION.—In order to carry out the final system plan the Corporation is authorized to issue stock and other securities. Common stock shall be issued initially to the estates of railroads in reorganization in the region in exchange for rail properties conveyed to the Corporation pursuant to the final system plan. Nothing in this subsection shall preclude the Corporation from repurchasing the common stock initially issued through payments out of profits in order to establish an employee stock ownership plan; and nothing in this subsection shall preclude the recipients of common stock initially issued from establishing an employee stock ownership plan.

(f) AUDIT AND EXPENDITURES.—So long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, the Corporation shall be subject to the provisions of the Government Corporation Control Act for the purposes of a Federal Government audit. Section 201 of the Government Corporation Control Act (31 U.S.C. 856) is amended by inserting at the end thereof the following: ", and (9) the Consolidated Rail Corporation to the extent provided in the Regional Rail Reorganization Act of 1973.".

Ante, p. 992.

(g) ANNUAL REPORT.—The Corporation shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed report on all activities and accomplishments of the Corporation during the preceding fiscal year.

Report to Congress and President.

POWERS AND DUTIES OF THE CORPORATION

SEC. 302. The Corporation shall have all of the powers and is subject to all of the duties vested in it under this Act, in addition to the powers conferred upon it under the laws of the State or States in which it is incorporated and the powers of a railroad in any State in which it operates. The Corporation is authorized and directed to—

(a) acquire rail properties designated in the final system plan to be transferred or conveyed to it;

(b) operate rail service over such rail properties except as provided under sections 304(e) and 601(d)(3) of this Act;

(c) rehabilitate, improve, and modernize such rail properties; and

(d) maintain adequate and efficient rail services.

So long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, the Corporation shall not engage in activities which are not related to transportation.

VALUATION AND CONVEYANCE OF RAIL PROPERTIES

SEC. 303. (a) DEPOSIT WITH COURT.—Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(c) of this Act—

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in

reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b) CONVEYANCE OF RAIL PROPERTIES.—(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 209(d) of this Act.

(2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

(3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made subject thereto; and the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lease under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)). 49 Stat. 911.

(4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation or the profitable railroad to whom the conveyance is made assumes all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(c) FINDINGS AND DISTRIBUTION.—(1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation in exchange for the securities and the other benefits accruing to such railroad as a result of such exchange, as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to a profitable railroad operating in the region, in accordance with the final system plan,

are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and 49 Stat. 911; 76 Stat. 572.

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization, which has transferred rail properties pursuant to the final system plan, it shall—

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the transfer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a profitable railroad operating in the region in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad. If the special court finds that the terms of one or more conveyances or exchanges for securities or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad so as not to exceed the constitutional minimum standard of fairness and equity.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, obligations, and compensation deposited with it under subsection (b) of this section to the trustee or trustees of each railroad in reorganization in the region who conveyed right, title, and interest in rail properties to the Corporation and the respective profitable railroads under such subsection.

(d) APPEAL.—A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss 62 Stat. 928.

any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

TERMINATION OF RAIL SERVICE

SEC. 304. (a) DISCONTINUANCE.—Except as provided in subsections (c) and (f) of this section, (1) rail service on rail properties of a railroad in the region which transfers to the Corporation or to profitable railroads operating in the region all or substantially all of its rail properties designated for such conveyance in the final system plan, and (2) rail service on rail properties of a profitable railroad operating in the region which transfers substantially all of its rail properties to the Corporation or to other railroads pursuant to the final system plan may be discontinued to the extent such discontinuance is not precluded by the terms of the leases and agreements referred to in section 303(b)(2) of this title if—

(A) the final system plan does not designate rail service to be operated over such rail properties; and

(B) not sooner than 30 days following the effective date of the final system plan the trustee or trustees of the applicable railroad in reorganization or a profitable railroad give notice in writing of intent to discontinue such rail service on a date certain which is not less than 60 days after the date of such notice; and

(C) the notice required by paragraph (B) of this subsection is sent by certified mail to the Governor and State transportation agencies of each State and to the government of each political subdivision of each State in which such rail properties are located and to each shipper who has used such rail service during the previous 12 months.

(b) ABANDONMENT.—(1) Rail properties over which rail service has been discontinued under subsection (a) of this section may not be abandoned sooner than 120 days after the effective date of such discontinuance except as provided in subsections (c) and (f) of this section. Thereafter, except as provided in subsection (c) of this section, such rail properties may be abandoned upon 30 days' notice in writing to all those required to receive notice under paragraph (2)(C) of subsection (a) of this section.

(2) In any case in which rail properties proposed to be abandoned under this section are designated by the final system plan as rail properties which are suitable for use for other public purposes (including roads or highways, other forms of mass transportation, conservation, and recreation), such rail properties shall not be sold, leased, exchanged, or otherwise disposed of during the 180-day period beginning on the date of notice of proposed abandonment under this section unless such rail properties have first been offered, upon reasonable terms, for acquisition for public purposes.

(c) LIMITATIONS.—Rail service may be discontinued and rail properties may be abandoned under subsections (a) and (b) of this section notwithstanding any provision of the Interstate Commerce Act (49 U.S.C. 1 et seq.) or the constitution or law of any State or the decision of any court or administrative agency of the United States or of any State. No rail service may be discontinued and no rail properties may be abandoned pursuant to this section— 24 Stat. 379.

(1) after 2 years from the effective date of the final system plan or more than 2 years after the final payment of any rail service continuation subsidy is received, whichever is later; or

(2) if a shipper, a State, the United States, a local or regional transportation authority, or any responsible person offers—

(A) a rail service continuation subsidy which covers the difference between the revenue attributable to such rail properties and the avoidable costs of providing service on such rail properties plus a reasonable return on the value of such rail properties;

(B) a rail service continuation subsidy which is payable pursuant to a lease or agreement with a State, or a local or regional transportation authority, under which financial support was being provided at the time of the enactment of this Act for the continuance of rail passenger service; or

(C) to purchase, pursuant to subsection (d) of this section, such rail properties in order to operate rail service over such properties.

If a rail service continuation subsidy is offered, the government or person offering the subsidy shall enter into an operating agreement with the Corporation or any responsible person (including a government entity) under which the Corporation or such person (including a government entity) will operate rail service over such rail properties and receive the difference between the revenue attributable to such properties and the avoidable costs of providing service on such rail properties and the trustee of any railroad in reorganization shall receive a reasonable rate of return on the value of any rail properties for which a rail service is operated under such subsidy.

(d) PURCHASE.—If an offer to purchase is made under subsection (c)(2)(C) of this section, such offer shall be accompanied by an offer of a rail service continuation subsidy. Such subsidy shall continue until the purchase transaction is completed, unless a railroad assumes operations over such rail properties on its own account pursuant to an order or authorization of the Commission. Whenever a railroad in reorganization in the region or a profitable railroad gives notice of intent to discontinue service pursuant to subsection (a) of this section, such railroad shall, upon the request of anyone apparently qualified to make a purchase offer promptly make available its most recent reports on the physical condition of such property together with such traffic and revenue data as would be required under subpart B of part 1121 of chapter X of title 49 of the Code of Federal Regulations and such other data necessary to ascertain the avoidable costs of providing service over such rail properties.

(e) ABANDONMENT BY CORPORATION.—After the rail system to be operated by the Corporation under the final system plan has been in operation for 2 years, the Commission may authorize the Corporation to abandon any rail properties as to which it determines that rail service over such properties is not required by the public convenience and necessity. The Commission may, at any time after the effective date of the final system plan, authorize additional rail service in the region or authorize the abandonment of rail properties which are not being operated by the Corporation or by any other person. Determinations by the Commission under this subsection shall be made pursuant to applicable provisions of the Interstate Commerce Act (49 U.S.C. 1). 24 Stat. 379.

(f) INTERIM ABANDONMENT.—After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority.

TITLE IV—LOCAL RAIL SERVICES

FINDINGS AND PURPOSE

SEC. 401. (a) FINDINGS.—The Congress finds and declares that—

(1) The Nation is facing an energy shortage of acute proportions in the next decade.

(2) Railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight and cause the least amount of pollution.

(3) Abandonment, termination, or substantial reduction of rail service in any locality will adversely affect the Nation's long-term and immediate goals with respect to energy conservation and environmental protection.

(4) Under certain circumstances the cost to the taxpayers of rail service continuation subsidies would be less than the cost of abandonment of rail service in terms of lost jobs, energy shortages, and degradation of the environment.

(b) PURPOSE.—Therefore, it is declared to be the purpose of the Congress to authorize the Secretary to maintain a program of rail service continuation subsidies.

RAIL SERVICE CONTINUATION SUBSIDIES

SEC. 402. (a) GENERAL.—The Secretary shall provide financial assistance in accordance with this section for the purpose of rail service continuation subsidies. For purposes of subsection (b)(1) of this section the Federal share of a rail service continuation subsidy shall be 70 per centum and the State share shall be 30 per centum. For purposes of subsection (b)(2) of this section a State receiving discretionary assistance shall be required to contribute at least 30 per centum of the cost of the program for which the Federal assistance is provided.

(b) ENTITLEMENT.—(1) Each State in the region is entitled to an amount for rail service continuation subsidies from 50 per centum of the sums appropriated each fiscal year for such purpose in the ratio which the total rail mileage in such State, as determined by the Secretary and measured in point-to-point length (excluding yard tracks and sidings), bears to the total rail mileage in all the States in the region, measured in the same manner, except that the entitlement of each State shall be no less than 3 per centum, and the entitlement of no State shall be more than 10 per centum, of 50 per centum of the funds appropriated. In the event that the total amount allocated under this formula, due to the application of the maximum and minimum limitations which it establishes, is greater or less than 50 per centum of the funds appropriated, the excess or deficiency, as the case may be, shall be added to or deducted from the Secretary's discretionary fund provided for in paragraph (2) of this subsection. The entitlement of any State which is withheld in accordance with this section and any sums not used or committed by a State during the preceding fiscal year shall be paid into the discretionary fund provided for in paragraph (2) of this subsection.

(2) The Secretary is authorized to provide discretionary financial assistance to a State or a local or regional transportation authority in the region for the purpose of continuing local rail services, including assistance for the purposes enumerated in section 403 of this title.

(c) ELIGIBILITY.—A State in the region is eligible to receive rail service continuation subsidies pursuant to subsection (b) of this section in any fiscal year if—

(1) the State has established a State plan for rail transportation and local rail services which is administered or coordinated by a designated State agency and such plan provides for the equitable distribution of such subsidies among State, local, and regional transportation authorities;

(2) the State agency has authority and administrative jurisdiction to develop, promote, supervise, and support safe, adequate, and efficient rail services; employs or will employ, directly or indirectly, sufficient trained and qualified personnel; and maintains or will maintain adequate programs of investigation, research, promotion, and development with provision for public participation;

(3) the State provides satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this title to the State; and

(4) the State complies with the regulations of the Secretary issued under this section.

(d) REGULATIONS.—Within 90 days after the date of enactment of this Act, the Secretary shall issue, and may from time to time amend, regulations with respect to basic and discretionary rail service continuation subsidies.

(e) PAYMENT.—The Secretary shall pay to each State in the region an amount equal to its entitlement under subsection (b)(1) of this section. Any amounts which are not expended or committed by a State pursuant to subsection (b) during the ensuing fiscal year shall be returned by such State to the Secretary, who may use such amounts in accordance with subsection (b)(2) of this section.

(f) TERM.—A rail service continuation subsidy between a State, or a local or regional authority, and the Corporation or other responsible person (including a government entity) may not exceed a term of 2 years.

(g) RECORD, AUDIT, AND EXAMINATION.—(1) Each recipient of financial assistance under this section, whether in the form of grants, subgrants, contracts, subcontracts, or other arrangements, shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance was given or used, the amount of that portion of the cost of the project supplied by other sources, and such other records as will facilitate an effective audit.

(2) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives shall, until the expiration of 3 years after completion of the project or undertaking referred to in paragraph (1) of this subsection, have access for the purpose of audit and examination to any books, documents, papers, and records of such receipts which in the opinion of the Secretary or the Comptroller General may be related or pertinent to the grants, contracts, or other arrangements referred to in such paragraph. GAO audit.

(h) WITHHOLDING.—If the Secretary, after reasonable notice and opportunity for a hearing to any State agency, finds that a State is not eligible for rail service continuation subsidies under subsections (c) and (d) of this section, payment to such State shall not be made until there is no longer any failure to comply.

(i) AUTHORIZATION FOR APPROPRIATIONS.—(1) There is authorized to be appropriated to carry out the purposes of this section such sums as are necessary, not to exceed $90,000,000 for each of the 2 fiscal years including and following the effective date of the final system plan. Such sums as are appropriated shall remain available until expended.

(2) One-half of the sums appropriated pursuant to the authorization of this subsection shall be reserved for allocation to States in the region under subsection (b)(1) of this section. One-half of the sums appropriated pursuant to the authorization of this subsection shall be reserved for distribution by the Secretary under subsection (b)(2) of this section.

(j) DEFINITION.—As used in this section, "rail service continuation subsidies" means subsidies calculated in accordance with the provisions of section 205(d)(3) of this Act to cover costs of operating adequate and efficient rail service, including where necessary improvement and maintenance of tracks and related facilities.

ACQUISITION AND MODERNIZATION LOANS

SEC. 403. (a) ACQUISITION.—If a State which is eligible for assistance under section 402(c) of this title or a local or regional transportation authority has made an offer to purchase any rail properties of a railroad pursuant to section 304(c)(2)(C) of this Act or other lawful authority, the Secretary is authorized to direct the Association to provide loans to such State or local or regional transportation authority not to exceed 70 per centum of the purchase price: *Provided, however*, That any recipient of such loan is no longer eligible for a rail service continuation subsidy pursuant to section 402 of this title.

(b) MODERNIZATION.—In addition to such acquisition loans, the Secretary is authorized to direct the Association to provide additional assistance not to exceed 70 per centum of the cost of restoring or repairing such rail properties to such condition as will enable safe and efficient rail transportation operations over such rail properties. Such financial assistance may be in the form of a loan or the guarantee of a loan. The Association shall provide such financial assistance as the Secretary may direct under this section and shall adopt regulations describing its procedures for such assistance. With the approval of the Secretary, a State may expend sums received by it under section 402 of this title for acquisition and modernization pursuant to this section.

TITLE V—EMPLOYEE PROTECTION

DEFINITIONS

SEC. 501. As used in this title unless the context otherwise requires—

(1) "acquiring railroad" means a railroad, except the Corporation, which seeks to acquire or has acquired, pursuant to the provisions of this Act, all or a part of the rail properties of one or more of the railroads in reorganization, the Corporation, or a profitable railroad;

(2) "employee of a railroad in reorganization" means a person who, on the effective date of a conveyance of rail properties of a railroad in reorganization to the Corporation or to an acquiring railroad, has an employment relationship with either said railroad in reorganization or any carrier (as defined in parts I and II of the Interstate Commerce Act) which is leased, controlled, or operated by the railroad in reorganization except a president, vice president, treasurer, secretary, comptroller, and any other person who performs functions corresponding to those performed by the foregoing officers; 49 USC 1, 301.

(3) "protected employee" means any employee of an acquiring railroad adversely affected by a transaction and any employee of a railroad in reorganization who on the effective date of this Act have not reached age 65;

(4) "class or craft of employees" means a group of employees, recognized and treated as a unit for purposes of collective bargaining,

which is represented by a labor organization that has been duly authorized or recognized pursuant to the Railway Labor Act as its representative for purposes of collective bargaining; 44 Stat. 577. 45 USC 151.

(5) "representative of a class or craft of employees" means a labor organization which has been duly authorized or recognized as the collective bargaining representative of a class or craft of employees pursuant to the Railway Labor Act;

(6) "deprived of employment" means the inability of a protected employee to obtain a position by the normal exercise of his seniority rights with the Corporation after properly electing to accept employment therewith or, the subsequent loss of a position and inability, by the normal exercise of his seniority rights under the applicable collective bargaining agreements, to obtain another position with the Corporation: *Provided, however*, That provisions in existing collective bargaining agreements of a railroad in reorganization, which do not require a protected employee, in the normal exercise of seniority rights, to make a change in residence, in order to maintain his protection, will be preserved and will also be extended and be applicable to all other protected employees of that same craft or class. It shall not, however, include any deprivation of employment by reason of death, retirement, resignation, dismissal or disciplinary suspension for cause, failure to work due to illness or disability, nor any severance of employment covered by subsections (d) and (e) of section 505 of this title;

(7) "employee adversely affected with respect to his compensation" means a protected employee who suffers a reduction in compensation;

(8) "transaction" means actions taken pursuant to the provisions of this Act or the results thereof; and

(9) "change in residence" means transfer to a work location which is located either (A) outside a radius of 30 miles of the employee's former work location and farther from his residence than was his former work location or (B) is located more than 30 normal highway route miles from his residence and also farther from his residence than was his former work location.

EMPLOYMENT OFFERS

SEC. 502. (a) APPLICABLE LAW.—The Corporation and, where applicable, the Association shall be subject to the provisions of the Railway Labor Act and shall be considered employers for purposes of the Railroad Retirement Act, Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. The Corporation, in addition, shall, except as otherwise specifically provided by this Act, be subject to all Federal and State laws and regulations applicable to carriers by railroad. 48 Stat. 1283. 26 USC 3201. 45 USC 367.

(b) MANDATORY OFFER.—The Corporation shall offer employment, to be effective as of the date of a conveyance or discontinuance of service under the provisions of this Act, to each employee of a railroad in reorganization who has not already accepted an offer of employment by the Association, where applicable, or an acquiring railroad. Such offers of employment to employees represented by labor organizations will be confined to their same craft or class. The Corporation shall apply to said employees the protective provisions of this title.

(c) ASSOCIATION.—After the transfer of rail properties pursuant to section 303, the Association, in employing any additional employees, shall give priority consideration to employees of a railroad in reorganization and the provisions of this title shall apply to any such employees employed by the Association as if they were employees of the Corporation.

ASSIGNMENT OF WORK

SEC. 503. The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of section 508 of this title.

COLLECTIVE-BARGAINING AGREEMENTS

SEC. 504. (a) INTERIM APPLICATION.—Until completion of the agreements provided for under subsection (d) of this section, the Corporation shall, as though an original party thereto, assume and apply on the particular lines, properties, or facilities acquired all obligations under existing collective-bargaining agreements covering all crafts and classes employed thereon, except that the Agreement of May 1936, Washington, D.C. and provisions in other existing job stabilization agreements shall not be applicable to transactions effected pursuant to this Act with respect to which the provisions of section 505 of this title shall be superseding and controlling. During this period, employees of a railroad in reorganization who have seniority on the lines, properties, or facilities acquired by the Corporation pursuant to this Act shall have prior seniority roster rights on such acquired lines, properties, or facilities.

(b) SINGLE IMPLEMENTING AGREEMENT.—On or before the date of the adoption of the final system plan by the Board of Directors of the Association as provided in section 207(c) of this Act, the representatives of the various classes or crafts of the employees of a railroad in reorganization involved in a conveyance pursuant to this Act and representatives of the Corporation shall commence negotiation of a single implementing agreement for each class and craft of employees affected providing (1) the identification of the specific employees of the railroad in reorganization to whom the Corporation offers employment; (2) the procedure by which those employees of the railroad in reorganization may elect to accept employment with the Corporation; (3) the procedure for acceptance of such employees into the Corporation's employment and their assignment to positions on the Corporation's system; (4) the procedure for determining the seniority of such employees in their respective crafts or classes on the Corporation's system which shall, to the extent possible, preserve their prior seniority rights; and (5) the procedure for determining equitable adjustment in rates of comparable positions. If no agreement with respect to the matters referred to in this subsection is reached by the end of 30 days after the commencement of negotiations, the parties shall within an additional 10 days select a neutral referee and, in the event they are unable to agree upon the selection of such referee, then the National Mediation Board shall immediately appoint a referee. After a referee has been designated, a hearing on the dispute shall commence as soon as practicable. Not less than 10 days prior to the effective date of any conveyance pursuant to the provisions of this Act, the referee shall resolve and decide all matters in dispute with respect to the negotiation of said implementing agreement or agreements and shall render a decision which shall be final and binding and shall constitute the implementing agreement or agreements between the parties with respect to the transaction involved. The salary and expenses of the referee shall be paid pursuant to the provisions of the Railway Labor Act.

44 Stat. 577.
45 USC 151.

(c) RELATIONSHIP TO OTHER PROVISIONS.—Notwithstanding failure for any reason to complete implementing agreements provided for in subsection (b) of this section, the Corporation may proceed with a conveyance of properties, facilities, and equipment pursuant to the provisions of this Act and effectuate said transaction: *Provided*, That all protected employees shall be entitled to all of the provisions of such agreements, as finally determined, from the time they are adversely affected as a result of any such conveyance.

(d) NEW COLLECTIVE-BARGAINING AGREEMENTS.—Not later than 60 days after the effective date of any conveyance pursuant to the provisions of this Act, the representatives of the various classes or crafts of the employees of a railroad in reorganization involved in a conveyance and representatives of the Corporation shall commence negotiations of new collective-bargaining agreements for each class and craft of employees covering the rates of pay, rules, and working conditions of employees who are employees of the Corporation, which collective-bargaining agreements shall include appropriate provisions concerning rates of pay, rules, and working conditions but shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with those established or prescribed herein.

EMPLOYEE PROTECTION

SEC. 505. (a) EQUIVALENT POSITION.—A protected employee whose employment is governed by a collective-bargaining agreement will not, except as explicitly provided in this title, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto.

(b) MONTHLY DISPLACEMENT ALLOWANCE.—A protected employee, who has been deprived of employment or adversely affected with respect to his compensation shall be entitled to a monthly displacement allowance computed as follows:

(1) Said allowance shall be determined by computing the total compensation received by the employee, including vacation allowances and monthly compensation guarantees, and his total time paid for during the last 12 months immediately prior to his being adversely affected in which he performed compensated service more than 50 per centum of each of such months, based upon his normal work schedule, and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for; and, if an employee's compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less any time lost on account of voluntary absences other than vacations, but said protected employee shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of his average monthly time, *Provided, however*, That—

(A) in determining compensation in his current employment the protected employee shall be treated as occupying the position, producing the highest rate of pay to which his qualifications and seniority entitle him under the applicable collective bargaining agreement and which does not require a change in residence;

(B) the said monthly displacement allowance shall be reduced by the full amount of any unemployment compensation benefits received by the protected employee and shall be reduced by an amount equivalent to any earnings of said protected employee in any employment subject to the Railroad Retirement Act and 50 per centum of any earnings in any employment not subject to the Railroad Retirement Act;

48 Stat. 1283.

(C) a protected employee's average monthly compensation shall be adjusted from time to time thereafter to reflect subsequent general wage increases;

(D) should a protected employee's service total less than 12 months in which he performs more than 50 per centum compensated service based upon his normal work schedule in each of said months, his average monthly compensation shall be determined by dividing separately the total compensation received by the employee and the total time for which he was paid by the number of months in which he performed more than 50 per centum compensated service based upon his normal work schedule; and

(E) the monthly displacement allowance provided by this section shall in no event exceed the sum of $2,500 in any month except that such amount shall be adjusted to reflect subsequent general wage increases.

(2) A protected employee's average monthly compensation under this section shall be based upon the rate of pay applicable to his employment and shall include increases in rates of pay not in fact paid but which were provided for in national railroad labor agreements generally applicable during the period involved.

(3) If a protected employee who is entitled to a monthly displacement allowance served as an agent or a representative of a class or craft of employees on either a full- or part-time basis in the 12 months immediately preceding his being adversely affected, his monthly displacement allowance shall be computed by taking the average of the average monthly compensation and average monthly time paid for of the protected employees immediately above and below him on the same seniority roster or his own monthly displacement allowance, whichever is greater.

(4) An employee and his representative shall be furnished with a protected employee's average monthly compensation and average monthly time paid for, computed in accordance with the terms of this subsection, together with the data upon which such computations are based, within 30 days after the protected employee notifies the Corporation in writing that he has been deprived of employment or adversely affected with respect to his compensation.

(c) DURATION OF DISPLACEMENT ALLOWANCE.—The monthly displacement allowance provided for in subsection (b) of this section shall continue until the attainment of age 65 by a protected employee with 5 or more years of service on the effective date of this Act and, in the case of a protected employee who has less than 5 years service on such date, shall continue for a period equal to his total prior years of service: *Provided*, That such monthly displacement allowance shall terminate upon the protected employee's death, retirement, resignation, or dismissal for cause; and shall be suspended for the period of disciplinary suspension for cause, failure to work due to illness or disability, voluntary furlough, or failure to retain or obtain a position available to him by the exercise of his seniority rights in accordance with the provisions of this section.

(d) TRANSFER.—(1) A protected employee who has been deprived of employment may be required by the Corporation, in inverse seniority order and upon reasonable notice, to transfer to any bona fide vacancy for which he is qualified in his same class or craft of employee on any part of the Corporation's system and shall then be governed by the collective-bargaining agreement applicable on the seniority district to which transferred. If such transfer requires a change in residence, any such protected employee may choose (A) to voluntarily furlough himself at his home location and have his monthly displacement allowance suspended during the period of voluntary furlough, or (B) to be severed from employment upon payment to him of a separation allowance computed as provided in subsections (e) and (f) of this section, which separation allowance shall be in lieu of all other benefits provided by this title.

(2) Such protected employee shall not be required to transfer to a location requiring a change in residence unless there is a bona fide need for his services at such location. Such bona fide need for services contemplates that the transfer be to a position which has not and cannot be filled by employees who are not required to make a change in residence in the seniority district involved and which, in the absence of this section, would have required the employment of a new employee.

(3) Such protected employee who, at the request of the Corporation, has once accepted and made a transfer to a location requiring a change in residence shall not be required again to so transfer for a period of 3 years.

(4) Transfers to vacancies requiring a change in residence shall be subject to the following:

(A) The vacancy shall be first offered to the junior qualified protected employee deprived of employment in the seniority district where the vacancy exists, and each such employee shall have 20 days to elect one of the options set forth in paragraph (1) of this subsection. If that employee elects not to accept the transfer, it will then be offered in inverse seniority order to the remaining qualified, protected employees deprived of employment on the seniority district, who will each have 20 days to elect one of the options set forth in paragraph (1) of this subsection.

(B) If the vacancy is not filled by the procedure in paragraph (4)(A) of this subsection, the vacancy will then be offered in the inverse order of seniority to the qualified protected employees deprived of employment on the system and each of such employees will be afforded 30 days to elect one of the options set forth in paragraph (1) of this subsection.

(C) The provisions of this paragraph shall not prevent the adoption of other procedures pursuant to an agreement made by the Corporation and representative of the class or craft of employees involved.

(e) SEPARATION ALLOWANCE.—A protected employee who is tendered and accepts an offer by the Corporation to resign and sever his employment relationship in consideration of payment to him of a separation allowance, and any protected employee whose employment

relationship is severed in accordance with subsection (d) of this section, shall be entitled to receive a lump-sum separation allowance not to exceed $20,000 in lieu of all other benefits provided by this title. Said lump-sum separation allowance, in the case of a protected employee who had not less than 3 nor more than 5 years of service as of the date of this Act, shall amount to 270 days' pay at the rate of the position last held and, in the case of a protected employee having had 5 or more years' service, shall amount to the number of days' pay indicated below at the rate of the position last held dependent upon the age of the protected employee at the time of such termination of employment:

60 or under	360 days' pay
61	300 days' pay
62	240 days' pay
63	180 days' pay
64	120 days' pay.

(f) TERMINATION ALLOWANCE.—The Corporation may terminate the employment of an employee of a railroad in reorganization, who has less than 3 years' service as of the effective date of this Act: *Provided, however*, That in such event the terminated employee shall be entitled to receive a lump sum separation allowance in an amount determined as follows:

2 to 3 years' service	180 days' pay at the rate of the position last held.
1 to 2 years' service	90 days' pay at the rate of the position last held.
Less than 1 year's service	5 days' pay at the rate of the position last held for each month of service.

(g) MOVING EXPENSE BENEFITS.—Any protected employee who is required to make a change of residence as the result of a transaction shall be entitled to the following benefits—

(1) Reimbursement for all expenses of moving his household and other personal effects, for the traveling expense of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss, not to exceed 10 working days. *Provided*, That the Corporation or acquiring railroad shall, to the same extent provided above, assume said expenses for any employee furloughed within 3 years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the Corporation or acquiring railroad within 90 days after the date on which the expenses were incurred.

(2)(A)(i) If the protected employee owns, or is under a contract to purchase, his own home in the locality from which he is required to move and elects to sell said home, he shall be reimbursed for any loss suffered in the sale of his home for less than its fair market value. In each case the fair market value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The Corporation or an acquiring railroad shall in each instance be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person.

(ii) A protected employee may elect to waive the provisions of paragraph (2)(A)(i) of this subsection and to receive, in lieu thereof, an amount equal to his closing costs which are ordinarily paid for and assumed by a seller of real estate in the jurisdiction in which the residence is located. Such costs shall include a real estate commission paid to a licensed realtor (not to exceed $3,000 or 6 per centum of sale price, whichever is less), and any prepayment penalty required by the institution holding the mortgage; such costs shall not include the payment of any "points" by the seller.

(B) If the protected employee holds an unexpired lease on a dwelling occupied by him as his home, he shall be protected from all loss and cost in securing the cancellation of said lease.

(C) No claim for costs or loss shall be paid under the provisions of this paragraph unless the claim is presented to the Corporation or an acquiring railroad within 90 days after such costs or loss are incurred.

(D) Should a controversy arise with respect to the value of the home, the costs or loss sustained in its sale, the costs or loss under a contract for purchase, loss or cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or his representative, and the Corporation or an acquiring railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the Corporation or acquiring railroad and these two, if unable to agree upon a valuation within 30 days, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days a third qualified real estate appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(h) APPLICATION OF TITLE.—Should a railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving a protected employee of benefits to which he otherwise would have become entitled under this title, the provisions of this title will apply to such employee.

CONTRACTING OUT

SEC. 506. All work in connection with the operation or services provided by the Corporation on the rail lines, properties, equipment, or facilities acquired pursuant to the provisions of this Act and the maintenance, repair, rehabilitation, or modernization of such lines, properties, equipment, or facilities which has been performed by practice or agreement in accordance with provisions of the existing contracts in effect with the representatives of the employees of the classes or crafts involved shall continue to be performed by said Corporation's employees, including employees on furlough. Should the Corporation lack a sufficient number of employees, including employees on furlough, and be unable to hire additional employees, to perform the work required, it shall be permitted to subcontract that part of such

work which cannot be performed by its employees, including those on furlough, except where agreement by the representatives of the employees of the classes or crafts involved is required by applicable collective-bargaining agreements. The term "unable to hire additional employees" as used in this section contemplates establishment and maintenance by the Corporation of an apprenticeship, training, or recruitment program to provide an adequate number of skilled employees to perform the work.

ARBITRATION

SEC. 507. Any dispute or controversy with respect to the interpretation, application, or enforcement of the provisions of this title, except section 504(d) and those disputes or controversies provided for in subsection (g)(2)(D) of section 505 and subsection (b) of section 504 which have not been resolved within 90 days, may be submitted by either party to an Adjustment Board for a final and binding decision thereon as provided in section 3 Second, of the Railway Labor Act, in which event the burden of proof on all issues so presented shall be upon the Corporation or, where applicable, the Association.

44 Stat. 578; 80 Stat. 208. 45 USC 153.

ACQUIRING RAILROADS

SEC. 508. An acquiring railroad shall offer such employment and afford such employment protection to employees of a railroad from which it acquires properties or facilities pursuant to this Act, and shall further protect its own employees who are adversely affected by such acquisition, as shall be agreed upon between the said acquiring railroad and the representatives of such employees prior to said acquisition: *Provided, however*, That the protection and benefits provided for protected employees in such agreements shall be the same as those specified in section 505 of this title: *And provided further, however*, That unless and until such agreements are reached, the acquiring railroad shall not enter into purchase agreements pursuant to section 303 of this Act.

PAYMENTS OF BENEFITS

SEC. 509. The Corporation, the Association (where applicable), and acquiring railroads, as the case may be, shall be responsible for the actual payment of all allowances, expenses, and costs provided protected employees pursuant to the provisions of this title. The Corporation, the Association (where applicable), and acquiring railroads shall then be reimbursed for such actual amounts paid protected employees, not to exceed the aggregate sum of $250,000,000, pursuant to the provisions of this title by the Railroad Retirement Board upon certification to said Board by the Corporation, the Association (where applicable), and acquiring railroads of the amounts paid such employees. Such reimbursement shall be made from a separate account maintained in the Treasury of the United States to be know as the Regional Rail Transportation Protective Account. There is hereby authorized to be appropriated to such protective account annually such sums as may be required to meet the obligations payable hereunder, not to exceed in the aggregate, however, the sum of $250,000,000. There is further authorized to be appropriated to the Railroad Retirement Board annually such sums as may be necessary to provide for additional administrative expenses to be incurred by the Board in the performance of its functions under this section.

Appropriation.

TITLE VI—MISCELLANEOUS PROVISIONS

RELATIONSHIP TO OTHER LAWS

SEC. 601. (a) ANTITRUST.—(1) Except as specifically provided in paragraph (2) of this subsection, no provision of this Act shall be deemed to convey to any railroad or employee or director thereof any immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) The antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan where such action was in compliance with the requirements of such plan.

(3) As used in this subsection, "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; and the antitrust laws of any State or subdivision thereof.

15 USC 2. 15 USC 12. 15 USC 58. 15 USC 8, 9. 15 USC 13.

(b) COMMERCE AND BANKRUPTCY.—The provisions of the Interstate Commerce Act (49 U.S.C. 1 et seq.) and the Bankruptcy Act (11 U.S.C. et seq.) are inapplicable to transactions under this Act to the extent necessary to formulate and implement the final system plan whenever a provision of any such Act is inconsistent with this Act.

24 Stat. 379. 30 Stat. 544.

(c) ENVIRONMENT.—(1) The provisions of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332 (2)(C)) shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan.

83 Stat. 853.

(d) NORTHEAST CORRIDOR.—(1) Rail properties designated in accordance with section 206(c)(1)(C) of this Act shall be leased or may (at its option) be purchased or otherwise acquired by the National Railroad Passenger Corporation. The Corporation shall negotiate an appropriate sale or lease agreement with the National Railroad Passenger Corporation as provided in the final system plan.

(2) Properties acquired by purchase, lease, or otherwise pursuant to this subsection shall be improved in order to meet the goal set forth in section 206(a)(3) of this Act, relating to improved high-speed passenger service, by the earliest practicable date after the date of enactment of this Act.

(3) The Secretary shall begin the necessary engineering studies and improvements upon enactment.

(4) The final system plan shall provide for any necessary coordination with freight or commuter services of use of the facilities designated in section 206(c)(1)(C) of this Act. Such coordination may be effectuated through a single operating entity, designated in the final system plan, or as mutually agreed upon by the interested parties.

(5) Construction or improvements made pursuant to this subsection may be made in consultation with the Corps of Engineers.

(e) EMERGENCY SERVICE.—Section 1(16) of the Interstate Commerce Act (49 U.S.C. 1(16)) is amended by inserting "(a)" before the word "Whenever" in the first sentence and adding the following new paragraph:

41 Stat. 477.

"(b) Whenever any carrier by railroad is unable to transport the traffic offered it because—

"(1) its cash position makes its continuing operation impossible;

"(2) it has been ordered to discontinue any service by a court; or

"(3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section;

the Commission may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic available to such carrier and its distribution over such carrier's lines, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people subject to the following conditions:

"(A) Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause shown for an additional designated period not to exceed 180 days.

"(B) No such directions shall be issued that would cause a carrier to operate in violation of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421) or that would substantially impair the ability of the carrier so directed to serve adequately its own patrons or to meet its outstanding common carrier obligations.

84 Stat. 971.

"(C) The directed carrier shall not, by reason of such Commission direction, be deemed to have assumed or to become responsible for the debts of the other carrier.

"(D) The directed carrier shall hire employees of the other carrier to the extent such employees had previously performed the directed service for the other carrier, and, as to such employees as shall be so hired, the directed carrier shall be deemed to have assumed all existing employment obligations and practices of the other carrier relating thereto, including, but not limited to, agreements governing rate of pay, rules and working conditions, and all employee protective conditions commencing with and for the duration of the direction.

"(E) Any order of the Commission entered pursuant to this paragraph shall provide that if, for the period of its effectiveness, the cost, as hereinafter defined, of handling, routing, and moving the traffic of another carrier over the other carrier's lines of road shall exceed the direct revenues therefor, then upon request, payment shall be made to the directed carrier, in the manner hereinafter provided and within 90 days after expiration of such order, of a sum equal to the amount by which such cost has exceeded said revenues. The term 'cost' shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit. Such cost shall be then currently recorded by the carrier or carriers in such manner and on such forms as by general order may be prescribed by the Commission and shall be submitted to and subject to audit by the Commission. The Commission shall certify promptly to the Secretary of the Treasury the amount of payment to be made to said carrier or carriers under the provisions of this paragraph. Payments required to be made to a carrier under the provisions of this paragraph shall be made by the Secretary of the Treasury from funds hereby authorized to be appropriated in such amounts as may be necessary for the purpose of carrying out the provisions hereof.".

"Cost."

ANNUAL EVALUATION BY THE SECRETARY

Report to Congress.

SEC. 602. As part of his annual report each year, the Secretary shall transmit to Congress each year a comprehensive report on the effectiveness of the Association and the Corporation in implementing the purposes of this Act, together with any recommendations for additional legislative or other action.

FREIGHT RATES FOR RECYCLABLES

SEC. 603. The Commission shall, by expedited proceedings, adopt appropriate rules under the Interstate Commerce Act (49 U.S.C. 1 et seq.) which will eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists.

24 Stat. 379.

SEPARABILITY

SEC. 604. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved January 2, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-620 (Comm. on Interstate and Foreign Commerce) and No. 93-744 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 119 (1973):
- Nov. 8, considered and passed House.
- Dec. 11, considered and passed Senate, amended.
- Dec. 13, Proceedings vacated; reconsidered and passed Senate, amended.
- Dec. 20, House agreed to conference report.
- Dec. 21, Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 1 (1974):
- Jan. 2, Presidential statement.

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